Henry Bathurst, 2d gaut

THE

THEORY

OF

EVIDENCE.

This book is in substance the chapters on Ev. wh. appear not
expressly in Powell's Mss of wh. 1st Ed. was 1767. See Lofft

Gilbert XXXIX of 5° to be a mere com=
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8°
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Advertiſement.

THE Author frankly confeſſes that he is greatly indebted to two manuſcript Treatiſes, wrote by different Hands, upon the ſame Subject: However he flatters himſelf that this Work has ſome Merit, as he has not ſlaviſhly copied after either; but has endeavoured with Freedom to correct their Errors, and to ſupply their Defects.

THE THEORY OF EVIDENCE.

EVIDENCE is two-fold; written, and not written. Written Evidence is 1. Public. 2. Private, between Party and Party.

1. Public, and that is likewiſe two-fold. 1. Records. 2. Matters of an inferior Nature. 1. Records. Theſe are the Memorials of the Legiſlature, and of the King's Courts of Juſtice, and are authentic beyond all Manner of Contradiction; for there can be no greater Demonſtration in a Court of Juſtice, than to appeal to its own Tranſactions: But being Things, to which every Man has a Right to have Recourſe, they cannot be transferred from Place to Place to ſerve a private Purpoſe, and therefore the Copies of them muſt be allowed in evidence; for ſince you cannot have the Original, the beſt Evidence you can have of them, is a true Copy. But a Copy of a

Copy is no Evidence, for the Rule demands the beſt Evidence the Nature of the Thing admits, and the further off any thing lies from the firſt original Truth, the weaker muſt be the Evidence; beſide, there muſt be a Chaſm in the Proof, for it cannot appear that the firſt was a true Copy

The firſt Sort of Records are Acts of Parliament: Theſe are the Memorials of the Legiſlature, and therefore are the higheſt and moſt abſolute Proof; and they either relate to the Kingdom in general, and are called general Acts of Parliament, or only to the Concerns of private Perſons, and are thence called private.

Hob. 227. Cr. Jac. 112. A general Act of Parliament is taken Notice of by the Judges and Jury without being pleaded; but a particular Act is not taken Notice of without being pleaded; for the Court cannot judge of particular Laws which do not concern the whole Kingdom, unleſs that Law be exhibited to the Court: For they are obliged by their Oaths to judge of all Matters coming before them *Secundum Leges et Conſuetudinem Angliæ*, and therefore they cannot be obliged *ex Officio* to take Notice of a particular Law, becauſe it is not *Lex Angliæ*, a Law relating to the whole Kingdom; and therefore, like all other private Matters, it muſt be brought before them to judge thereon.

But a private Act of Parliament, or any other private Record, may be brought before the Jury, if it relate to the Iſſue in Queſtion, though it be not pleaded; for the Jury are to

to find the Truth of the Fact in Queſtion, according to the Evidence brought before them; and therefore if the private Act does evince the Truth of the Matter in Queſtion, it is as proper Evidence to the Jury as any Record, or any other Evidence whatever: Nay, ſince ſuch Records are moſt authentic, it is the propereſt Sort of Evidence.

On an Attaint, a particular Act of Parliament cannot be given in Evidence to the Grand Jury, which was not given in Evidence to the Petit Jury; for ſince on the Attaint the former Verdict is called in Queſtion, and the Jury is to be puniſhed for the Iniquity of that Verdict, it follows, of Conſequence, that no more Evidence can be given, than was offered to the Petit Jury, for they could not make any Diſcernment but upon the Evidence offered, and therefore ought not to be called in Queſtion upon different Evidence. Hob. 227. Dy. 129.

But a general Statute may be offered in Evidence to the Grand Jury in an Attaint, though it was not offered in Evidence to the Petit Jury; becauſe of a general Law every Perſon who lives under it is ſuppoſed to take Notice, and, by Conſequence, the firſt Jury in their Deciſion were obliged to underſtand it, otherwiſe they ought to have referred it back to the Deciſion of the Court; for when the Jury take upon them to judge of the whole Matter, they do at their Peril take upon themſelves the Underſtanding of the Law: And if the Petit Jury have judged without being apprized of the general Law of the Kingdom, as they ought to be; yet that may nevertheleſs Hob. 227.

leſs be offered to the Grand Jury, who may be made ſenſible of ſuch general Laws on which their Judgment muſt be founded.

4 Co. 76. Now the Diſtinction between a general and particular Law is, Whatever concerns the Kingdom in general, is a general Law; whatever concerns a particular Species of Men, or ſome Individuals, is a particular Law, and muſt be pleaded.

Hob. 227. From this Definition it is plain, that the ſame Law may be both general and particular in different Parts; *Ex. gr.* 3 *Jac.* 1. againſt Recuſants is general in diſabling them to preſent; yet the Clauſe giving their Preſentations to the Univerſities muſt be pleaded or found.

4 Co. 76. A Law which concerns the King is a general Law, becauſe he is the Head and Union of the Commonwealth. A Law that concerns all Lords, is a general Law, becauſe it concerns the whole Property of the Kingdom, it being all held under Lords mediate or immediate. But a Law that concerns only the Nobility, or Lords Spiritual, is a particular Law, becauſe it relates to no more than one Set of Perſons; as if a Law makes them liable to ſuch and ſuch Proceſs. Yet, perhaps, if a Law related to the Body of the Peerage, it would be deemed a general Law, for as ſuch they are Part of the Legiſlature, and what relates to the Conſtitution is a general Law.

What relates to all Officers in general, is a general Law, becauſe it concerns the univerſal Adminiſtration of Juſtice; as that no Sheriff

or

or other Officer ſhould take a Reward for his Office. But if it relates only to particular Officers, as to Sheriffs (23 *H.* 6. 10.) it is a parcular Law.

What relates to all ſpiritual Perſons, is a general Law, inaſmuch as the Religion of the Kingdom is the general Concernment of the whole Kingdom, as 21 *H.* 8. 13 *Eliz.* 10. 18 *Eliz.* 11. But what relates to one Set of ſpiritual Perſons is particular, as the Act of 11 *Eliz.* of Biſhops Leaſes.

An Act that comprehends all Trades in general, becauſe it relates to Traffic in general: But an Act that relates to Grocers or Butchers is particular.

If the Matter of a Law be never ſo ſpecial, yet if it relates equally to all, it is a general Law: But a Law relating to ſome Counties or Pariſhes is ſpecial.

But there are ſome Caſes in which both public and private Statutes ought to be pleaded, and that is where they make void any legal Solemnities; for in this Caſe, the Conſtruction of the Law is, not that the ſolemn Contracts ſhall be deemed perfect Nullities, but that they are voidable by the Parties prejudiced by ſuch Contracts: And one Reaſon of this Conſtruction ariſes from this Rule, in expounding Statutes, *viz. Quiſquis poteſt renunciare Juri pro ſe introducto.* But if ſuch Contracts were conſtrued to be perfect Nullities, that Rule muſt be laid aſide, and the Party muſt receive Benefit by the Law, whether he would or not. And therefore ſuch Acts of Parliament muſt be pleaded, that the Party may appear to

take the Benefit of them. Another Reaſon of this Conſtruction is, becauſe what ſhall conſtitute the Solemnities of a Contract, is Matter of Law, and ſo it is Matter of Law how theſe Solemnities ought to be defeated and deſtroyed. And inaſmuch as it is Matter of Law by what Solemnities a Contract is to be conſtituted, therefore, when any Action is founded upon any ſolemn Contract, that Contract ought to be proffered to the Court: Now it were prepoſterous that the Law ſhould require the Contract to be offered to the Court, that it may appear to be legally made, and that it ſhould not require it to be offered to the Court how it is defeated: Both certainly muſt be determined by the ſame Judicature.

5 Co. 119. Hob. 72. Therefore you cannot give the Act of *Eliz.* touching uſurious Contracts in Evidence on the general Iſſue, though a general Law, but it ought to be pleaded.

So the Statute of Sheriffs Bonds cannot be given in Evidence on the general Iſſue, but ought to be pleaded.

2 Inſt. 336. So a Fine is made void by the Statute of *Weſtm.* 2. *c.* 1. but conſtrued only to be voidable.

4 Co 59. And a Recovery by a Wife with a ſecond Huſband is made void by 11 *H.* 8. but conſtrued only voidable.

If an Action or Information be brought upon a penal Statute, and there is another Statute that exempts or diſcharges the Defendant from the Penalty; this ought to be pleaded, and cannot be given in Evidence on the general

general Iſſue: For the general Iſſue is but a Denial of the Plaintiff's Declaration, and the Plaintiff has proved him Guilty, when he has proved him within the Law upon which he has founded his Declaration, ſo that the Plaintiff has performed what he has undertaken: But if the Defendant would exempt himſelf from the Charge, he ſhould not have denied the Declaration, but have ſhewn the Law that diſcharges him.

Another Difference is taken between where the Proviſo is Matter of Fact, and where it is Matter of Law.

For where it is mere Matter of Fact, it may be given in Evidence; as if an Action of Debt be brought againſt a ſpiritual Perſon for taking a Farm, the Defendant pleads *quod non habuit nec tenuit ad firmam contra formam Statuti*; upon this Iſſue is joined: The Defendant may give in Evidence that it was for the Maintenance of his Houſe, according to the Proviſo in the Statute. But on an Information on 5 *E.* 6. *c.* 4. for Ingroſſing, the Defendant cannot, upon the general Iſſue, give in Evidence a Licence of three Juſtices, according to the Proviſo: Becauſe whether there be a ſufficient Authority given is Matter of Law, and therefore cannot be given in Evidence, but muſt be pleaded.

A ſaving Proviſo may be given in Evidence on the general Iſſue, becauſe if the Party is within the Proviſo, he is not guilty on the Body of the Act on which the Action is founded. Jones 320. 2 Ro. Ab. 683.

Tri. per pais, 232.
1 Stra. 446.

Of general Acts of Parliament the printed Statute Book is Evidence: Not that the printed Statutes are the perfect and authentic Copies of the Records themſelves; but every Perſon is ſuppoſed to know the Law, and therefore the printed Statutes are allowed to be Evidence, becauſe they are the Hints of that, which is ſuppoſed to be lodged in every Man's Mind already.

But in private Acts of Parliament, the printed Statute Book is not Evidence, though reduced into the ſame Volume with the general Statutes: But the Party ought to have a Copy compared with the Parliament Roll, for they are not conſidered as already lodged in the Minds of the People.

Ca. K. B. 216.

However a private Act of Parliament, that is in Print, that concerns a whole County, as the Act of *Bedford* Levels, may be given in Evidence, without comparing it with the Record. So the Act for rebuilding *Tiverton*. And theſe Things are the rather admitted, becauſe they gain ſome Authority from being printed by the King's Printer; and, beſides, from the Notoriety of the Subject of them, they are ſuppoſed not to be wholly unknown. And for this Reaſon, printed Copies of other Things of as public a Nature have been admitted in Evidence, without being compared with the Original; as the printed Proclamation for the Peace, which was admitted to be read without being examined by the Record in Chancery.

Goodright v. Skinner, M. 7. G. 2. C. B.

Ca. K. B. 216.

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The next Thing is the Copies of all other Records, and they are two-fold; under Seal, and not under Seal.

First, under Seal; and these are called Exemplifications, and are of better Credit than any sworn Copy; for the Courts of Justice, that put their Seals to the Copy, are supposed more capable to examine, and more exact and critical in their Examination, than another Person is or can be.

Exemplifications are two-fold; under the Broad Seal, and under the Seal of the Court.

First, under the Broad Seal; and such Exemplifications are of themselves Records of the greatest Validity, and to which the Jury ought to give Credit under the Penalty of an Attaint. 2 Sid. 146.

When a Record is exemplified under the Broad Seal, it must either be a Record of the Court of Chancery, or be sent for into the Court of Chancery by *Certiorari*, which is the Center of all the Courts, and from thence the Subject receives a Copy under the Attestation of the Great Seal. 3 Inst. 173.

If Letters Patent are given in Evidence, in which it is recited that a certain Office was before granted to *J. S.* and that *J. S.* surrendered it to the King, who accepted the same, and granted it to *J. D.* this is not enough to avoid the Title of *J. S.* but the Record of the Surrender must be shewn, or a true Copy of it, for the Recital of such Surrender is not the best Evidence the Nature of the Thing will admit; and it would be of dangerous 2 Ro. Ab. 678

Con-

Conſequence, if, by ſuch Sort of Suggeſtion, a Man's Title might be avoided. But if Letters Patent were given in Evidence whereby a particular Eſtate is granted, and after Letters Patent are thereon granted, whereby, in Conſideration of the firſt Letters Patent, the King grants a particular Eſtate to the Party; this is a good Proof of a Surrender, for the taking of an Eſtate by the ſecond Letters Patent is a Surrender of the firſt: Now the ſecond Letters Patent are the beſt Proof of the taking ſuch Eſtate; and then the Surrender is
2 Vent. 170. by Operation and Conſtruction of Law. And in the Caſe firſt put, if the Defendant will take Advantage of the Recital of a former Grant, as Proof of ſuch former Grant, he will be bound by the Recital of the Surrender; for if he will take any Advantage of the Recital, he muſt admit the whole; but if he produces the former Patent, that will put
2 Lev. 108. the Plaintiff to produce the Surrender.——So if Letters Patent recite a former Grant to another, and grant the Office to commence from the Determination thereof, the Party claiming under the ſecond, muſt produce a Copy of the firſt Grant, that the Court may ſee that it is determined; for there can be no other Proof of the Determination of the Grant, but the Grant itſelf, though perhaps in ſuch Caſe, if the Recital was that it was determined, the whole Recital would be taken together.

Nothing but Records exemplified under the Broad Seal may be admitted in Evidence, for theſe being preſerved by the proper Officer

of

of every Court from all Raſure and Corruption, are ſuppoſed to be ſo fair and unblotted, that there can be no Danger in the Exemplification. But the Exemplification of Deeds under the Broad Seal cannot be admitted in Evidence, for they being in the Cuſtody of the Party, and not of the Law, are ſubject to Raſures and Interlineations, and therefore ought to be produced themſelves, as the beſt Evidence of the Contract.

When any Record is exemplified, the whole muſt be exemplified, for the Conſtruction muſt be taken from a View of the whole taken together. However this Rule is to be taken with ſome Reſtriction. In Caſes of Inquiſition *poſt Mortem*, and ſuch private Offices, you cannot read the Return without alſo reading the Commiſſion. But in Caſes of more general Concern, ſuch as the Miniſter's Return to the Commiſſion in *H.* 8. Time, to enquire into the Value of Livings, it would be of ill Conſequence to oblige the Parties to take Copies of the whole Record; and the Commiſſion is a Thing of ſuch public Notoriety, that it requires no Proof. 3 Inſt. 173.

Secondly, The ſecond Sort of Copies under Seal are the Exemplifications under the Seal of the Court, and they are of higher Credit than a ſworn Copy, for the Reaſons formerly mentioned; for ſuch Exemplifications can only be of the Records of the Court, under whoſe Seal they are exemplified.

The ſecond Sort of Copies are thoſe, that are not under Seal, and they are likewiſe two-fold, 1. Sworn Copies. 2. Office Copies.

First,

Firſt, Sworn Copies: Theſe muſt be of the Records brought into Court in Parchment, and not of a Judgment in Paper ſigned by the Maſter, though upon ſuch Judgment you may take out Execution; for it does not become a permanent Matter, till it be delivered into Court, and, is there fixed as a Roll of the Court, and, until it becomes a Roll of the Court, it is transferable any where, and ſo does not come under the Reaſon of the Law, that permits us to give a Copy in Evidence.

1 Mod. 117. Salk. 285. Where a Record is loſt a Copy of it may be admitted without ſwearing it a true Copy, for the Record is in the Cuſtody of the Law, and therefore, if loſt, there ought to be no Injury ariſing to the Party's Right, and conſequently the Copy muſt be admitted without ſwearing any Examination of it, ſince there is nothing with which it can be compared. But, in ſuch Caſes, the Inſtrument muſt be according to the Rule required by the Civil Law, *Vetuſtate temporis aut Judiciaria Cognitione roborata*.

Corvin. Dig. 292.

1 Vent. 257. So the Copy of a Decree of Tythe, in *London*, has often been given in Evidence, without proving it a true Copy, becauſe the Original is loſt.

Ibid. So a Copy of a Recovery of Lands in ancient Demeſne was given in Evidence where the original was loſt, and Poſſeſſion had gone along time according to the Recovery.

3 Inſt. 173. When a Man gives in Evidence a ſworn Copy of a Record, he muſt give the Copy of the whole Record in Evidence, for the precedent

dent or ſubſequent Words or Sentence may vary the whole Senſe and Import of the Thing produced, and give it quite another Face; and therefore ſo much at leaſt in all Caſes ought to be produced as concerns the Matter in queſtion. Poſt.

Secondly, An Office Copy: Here a Difference is to be taken between a Copy Authenticated by a Perſon truſted for that Purpoſe, for there, that Copy is Evidence without Proof; and a Copy given out by an Officer of the Court, who is not truſted for that Purpoſe, which is not Evidence without proving it actually examined.

The Reaſon of the Difference is, that where the Law has appointed any Perſon for any Purpoſe, the Law muſt truſt him as far as he acts under its Authority; therefore the Chirograph of a Fine is Evidence of ſuch Fine, becauſe the Chirographer is appointed to give out Copies of the Agreements between the Parties, that are lodged of Record.

So where the Deed is inrolled, the Indorſement of the Inrolment is Evidence without further Proof of the Deed, becauſe the Officer is intruſted to authenticate ſuch Deed by Inrolment: But if the Officer of the Court makes out a Copy, when he is not intruſted to that Purpoſe, they ought to prove it examined, becauſe, being no Part of his Office, he is but a private Man, and a private Man's mere Writing ought not to be credited without an Oath. Therefore it is not enough to give in Evidence a Copy of a Judgment, though

though it be examined by the Clerk of the Treaſury, becauſe it is no Part of the neceſſary Office of ſuch a Clerk, for he is only intruſted to keep the Records for the Benefit of all Men's Peruſal, and not to make out Copies of them.—So if the Deed inrolled be loſt, and the Clerk of the Peace make out a Copy of the Inrolment, that is no Evidence without proving of it examined, becauſe the Clerk is truſted to authenticate the Deed itſelf by Inrolment, and not to give out Copies of the Inrolment.

The Office Copies of Depoſitions are Evidence in Chancery but not at Common Law, without Examination with the Roll; for though that Court have for their own Convenience impowered their Officers to make out ſuch Copies as ſhould be Evidence; yet the particular Rules of their Courts are not taken Notice of by the Courts of Common Law, and therefore it is not Evidence in thoſe Courts.

Chettle *and* Pound, T. Aſſ. 1700. Allen's Caſes 13. C. Clayl. 51. S. C.

Where the Fine is to be proved with Proclamations, (as it muſt be to bar a Stranger) the Proclamations muſt be examined with the Roll, for the Chirographer is authorized by the Common Law to make out Copies to the Parties of the Fine itſelf, yet is not appointed by the Statute to copy the Proclamations, and therefore his Indorſement on the Back of the Fine is not binding.

Having thus ſhewed how the Record is to be given in Evidence by producing a Copy, we muſt next inquire in what Manner, and in what Caſe, they ought to be Evidence.

It

1. It is regularly true, that where the Record is pleaded, and appears in the Allegations, it muſt be tried by the Court on the Iſſue of *Nul tiel Record*, and in ſuch Caſe the Record itſelf muſt be produced, in caſe it is a Record of the ſame Court; and in caſe it is a Record of another Court, then an Exemplification of it muſt be brought in *ſub pede Sigilli*: But to this there is this Exception, that where the Record is Inducement and not the Giſt of the Action, there it is not of itſelf traverſable, but muſt be given in Evidence on the Proof of the Declaration; for nothing can be of itſelf traverſable, that does not make a full End of the Matter, and it cannot make a full End of the Matter, if Fact is joined with it; in ſuch Caſe, therefore, the Iſſue muſt be upon Fact, and tried by a Jury, and the Record may be given in Evidence to ſupport the Fact, and whenever a Record is offered to a Jury, any of the aforementioned Copies are Evidence.

2. As to Recoveries and Judgments. A Præcipe doth not lie againſt a Perſon that is not ſeiſed of the Freehold, therefore when you ſhew a Recovery, you muſt prove Seiſin in the Tenant to the Præcipe: However, in an ancient Recovery, Seiſin will be preſumed, eſpecially where Poſſeſſion has gone agreeable to it ever ſince, for that fortifies the Preſumption, that every thing is rightly tranſacted: But, in a modern Recovery, the Seiſin muſt be proved, becauſe, from the Recency of the Fact, it is eaſy to be done, and the Preſumption 1 Mod. 117.

Preſumption is not in ſuch Caſe equally fortified by the ſubſequent Poſſeſſion.

2 Ro. Ab. 395 Moor 256. If there be a Tenant for Life, Remainder in Tail, and they join in a common Recovery with ſingle Voucher, this will not bar the Tail; becauſe the Præcipe is brought againſt both as joint Tenants, and he in Remainder has no immediate Eſtate of Freehold; and a Remainder Man is not bound by a Recovery had againſt Tenant for Life, unleſs he comes in upon the aid Prayer, or as a Vouchee upon a double Voucher; for where any Perſon is properly in Court and does not defend his Title, he is barred as well as if he had no Title at all; and when Tenant in Tail is barred for want of Title, the Iſſue can never after recover in a Formedon.

By 14 *G.* 2. *c.* 20. it is enacted, That all common Recoveries ſuffered, or to be ſuffered, without any Surrender of the Leaſes for Life, ſhall be valid. Provided it ſhall not extend to make any Recovery valid, unleſs the Perſon intitled to the firſt Eſtate for Life, or other greater Eſtate, has or ſhall convey, or join in conveying, an Eſtate for Life at leaſt to the Tenant to the Præcipe. And by the ſame Act, where any Perſon has or ſhall purchaſe, for a valuable Conſideration, any Eſtate, whereof a Recovery was neceſſary to complete the Title, ſuch Perſon, and all claiming under him, having been in Poſſeſſion from the Time of ſuch Purchaſe, ſhall and may, after the End of twenty Years from the Time of ſuch Purchaſe, produce in Evidence the Deed making a Tenant to the Præcipe, and declaring the

the Uſes; and the Deed ſo produced (the Execution thereof being duly proved) ſhall be deemed ſufficient Evidence that ſuch Recovery was duly ſuffered, in caſe no Record can be found of ſuch Recovery, or the ſame ſhould appear not regularly entered: Provided that the Perſon making ſuch Deed had a ſufficient Eſtate and Power to make a Tenant to the Præcipe, and to ſuffer ſuch common Recovery.—It is further enacted, That every common Recovery ſuffered, or to be ſuffered, ſhall, after the Expiration of twenty Years, be deemed valid; if it appears upon the Face of ſuch Recovery that there was a Tenant to the Writ, and if the Perſons joining in ſuch Recovery had a ſufficient Eſtate or Power to ſuffer the ſame, notwithſtanding the Deed to make a Tenant to ſuch a Writ ſhall be loſt. It is further enacted, That every Recovery ſhall be deemed valid, notwithſtanding the Fine or Deed making a Tenant to ſuch a Writ ſhall be levied or executed after the Time of the Judgment given, and the Award of Seiſin; provided the ſame appear to be levied or executed before the End of the Term in which ſuch Recovery was ſuffered, and the Perſons joining in ſuch Recovery had a ſufficient Eſtate and Power to ſuffer the ſame.

Though regularly no Recovery or Judgment is to be admitted in Evidence but againſt Parties or Privies, yet under ſome Circumſtances they may; as in the Caſe of *The King* and *Hebden*, where in an Information in Nature of a *Quo Warranto*, a Judgment of Ouſter was 2 Str. 1109.

allowed to be given in Evidence to prove the Ouſter of a third Perſon, the Mayor by whom the Defendant was admitted.

1 Ld. Raym. 730.

3. As to the Verdicts the Rule is, That no Verdict ſhall be given in Evidence, but between ſuch who are Parties or Privies to it. Therefore if there be ſeveral Remainders limited by the ſame Deed, a Verdict for one in Remainder ſhall be given in Evidence for one next in Remainder.

Hard. 462.

But if there be a Recovery by Verdict againſt Tenant for Life, this is no Evidence againſt the Reverſioner; for the Tenant for Life is ſeiſed in his own Right, and that Poſſeſſion is properly his own; and he is at Liberty to pray in aid of the Reverſioner or not; and the Reverſioner cannot poſſibly controvert the Matter where no aid is prayed. But if he comes in upon an aid Prayer, he may have an Attaint, and conſequently the Verdict will be Evidence againſt him.

Yelv. 22.

Sherwin *and* Clarges 1700.

If a Verdict be had on the ſame Point, and between the ſame Parties, it may be given in Evidence, though the Trial was not had for the ſame Lands, for the Verdict in ſuch Caſe is a very perſwading Evidence; becauſe what twelve Men have already thought of the Fact may be ſuppoſed fit to direct the Determination of the preſent Jury; but then this Verdict ought to be between the ſame Parties, becauſe otherwiſe a Man would be bound by a Deciſion, who had not the Liberty to croſs examine; and nothing can be more contrary to natural Juſtice, than that any Body ſhould be injured by a Determination, that he,

he, or thoſe under whom he claims, was not at Liberty to controvert. But it is not neceſſary that the Verdict ſhould be in Relation to the ſame Land, for the Verdict is only ſet up to prove the Point in Queſtion, and every Matter is Evidence, that amounts to a Proof of the Point in Queſtion.

If there be a Trial of a Title between *A.* Leſſee of *B.* and *E.* and afterwards there be a Trial between *C.* Leſſee of *E.* and *B. C.* may give in Evidence the Verdict found againſt *B.* for this was the Senſe of a former Jury on the Fact, on which Trial *B.* had the Liberty to croſs examine; for the Court will take Notice that in Ejectment the Leſſor is the real Party intereſted, and that the Leſſee (or nominal Plaintiff) is a fictitious Perſon. But a Perſon that has no Prejudice by the Verdict againſt *B.* could never give it in Evidence, though his Title turns on the ſame Point, becauſe if he be an utter Stranger to the Fact, it is perfectly *Res nova* between him and the Defendant; and if it could be no Prejudice to the Plaintiff, had the Fate of the Verdict been as it would, he cannot be entitled to reap a Benefit; for no Record of Conviction or Verdict ſhall be given in Evidence but ſuch whereof the Benefit may be mutual, *viz.* Such whereof the Defendant, as well as the Plaintiff, might have made Uſe, and give it in Evidence in caſe it made for him; therefore a Conviction at the Suit of the King, for a Battery, cannot be given in Evidence in Treſpaſs for the ſame Battery.

3 Mod. 142. Hard. 472.

C. K. B. 319.

Hob. 53. When it is ſaid that a Verdict may be given in Evidence between the ſame Parties, it is to be underſtood with this Reſtriction, that it is of a Matter which was in Iſſue in the former Cauſe; for otherwiſe it will not be allowed in Evidence, becauſe, if ſuch Verdict be falſe, there is no Redreſs, and the Jury are not liable to an Attaint.

The Exception of its being *Res inter alios acta* is not allowed againſt Verdicts in the Caſes of Cuſtoms and Tolls; for the Cuſtom and Toll is *Lex loci*, and Facts tending to prove that, may be given in Evidence by any Perſon, as well as thoſe who have been Parties to ſuch Facts, or to ſuch Verdicts as have found and determined them; and in ſuch Caſe it is not material whether ſuch Verdicts are recent or ancient.

Another Caſe, in which this Exception ought not to be allowed, is where the Fact to be proved is ſuch whereof Hearſay and Reputation are Evidence, and therefore a ſpecial Verdict between other Parties, ſtating a Pedigree, would be Evidence to prove a Deſcent; for in ſuch Caſe, what any of the Family, who are dead, have been heard to ſay, or the general Reputation of the Family, Entries in Family Books, monumental Inſcriptions, Recitals in Deeds, *&c.* are allowed. And of this Opinion was Mr. Juſtice *Wright* in the Duke of *Athol*'s Caſe, which Opinion is generally approved, though the Determination by the reſt of the Court was contrary: Perhaps found-

2 Str. 1151.

Ca. K. B. 343 ing themſelves on the Caſe of Sir *William Clarges* and *Sherwin*, where in a Trial at Bar, the only

only Queſtion was upon the Legitimacy of the Duke of *Albemarle*, and the Court would not ſuffer a former Verdict between other Parties concerning other Land depending upon the ſame Queſtion and Title to be read in Evidence: But there it did not appear either from the Iſſue or Verdict that the ſame Queſtion was inquired into and determined. Beſide, the giving a Verdict in Evidence to prove a particular Fact, *viz.* That *John* had a Son *Thomas*, is very different from giving it in Evidence to ſhew the Opinion of a former Jury, which is only their Deduction from a Variety of Facts proved to them.

A Verdict will not be admitted in Evidence without likewiſe producing a Copy of the Judgment founded upon it, becauſe it may happen that the Judgment was arreſted, or a new Trial granted; but this Rule does not hold in the Caſe of a Verdict on an Iſſue directed out of Chancery, becauſe it is not uſual to enter up Judgment in ſuch Caſe; and the Decree of the Court of Chancery is equally Proof that the Verdict was ſatisfactory and ſtands in force.

Montgomery *and* Clarke 1745. at Delegates.

4. As to Writs. When a Writ is only Inducement to the Action, the taking out the Writ may be proved without any Copy of it, becauſe poſſibly it might not be returned, and then it is no Record; but where the Writ itſelf is the Giſt of the Action, you muſt have a Copy from the Record, inaſmuch as you are to have the utmoſt Evidence the Nature of the Thing is capable of, and it cannot

Tri. per pais, 167.

become the Gift of the Action till it is returned.

1 Ld. Raym. 733. In an Action of Treſpaſs againſt a Bailiff for taking Goods in Execution, if it is brought by the Party againſt whom the Writ iſſued, it is ſufficient for the Officer to give in Evidence the Writ of *Fieri facias*, without ſhewing a Copy of the Judgment: But if the Plaintiff is not the Party againſt whom the Writ iſſued, but claims the Goods by a prior Execution (or Sale) that was fraudulent, there the Officer muſt produce not only the Writ, but a Copy of the Judgment; for, in the firſt Caſe, by proving that he took the Goods in Obedience to a Writ iſſued againſt the Plaintiff he has proved himſelf guilty of no Treſpaſs: But in the other Caſe they are not the Goods of the Party againſt whom the Writ iſſues, and therefore the Officer is not juſtified by the Writ in taking them, unleſs he can bring the Caſe within 13 *Eliz.* for which Purpoſe it is neceſſary to ſhew a Judgment.

In an Action by an Attorney for his Fees, it is ſufficient to prove the taking out the Writ by a Warrant made by the Officer, for the Writ may not be returned, and then the Warrant is ſufficient to prove a Title to his Fees; for the Attorney is intitled to his Fees whether the Writ be returned or not.

The next Thing to be conſidered are all public Matters, that are not Records, and they all come under this general Definition, that they muſt be ſuch as are an Evidence of themſelves, and that they do not expect Illuſtration

tration from any other Thing; ſuch are Court Rolls and Tranſactions in Chancery; and the Copies of ſuch Matters may be given in Evidence, inaſmuch as here is a plain coherent Proof, for you have proved upon Oath a Matter, which, if produced, would carry its own Lights with it, and by Conſequence would need no Proof.

The Reaſon why the Proceedings in Chancery are not Records is this, becauſe they are not the Precedents of Juſtice; for the Judgment there is *ſecundum æquum et bonum*, and not *ſecundum Leges et Conſuetudines*. And the Reaſon why any Record is of Validity and Authority is, becauſe it is a Memorial of what is the Law of the Nation. Now Chancery Proceedings are no Memorials of the Laws of *England*, becauſe the Chancellor is not bound to proceed according to the Laws.

Alſo the Rolls of the County Courts, and the Proceedings of the Eccleſiaſtical Court, are no Records, becauſe theſe Courts are not derived by immediate Authority from the King, but from the Biſhop or the Baron of the County; and there is no Court declarative of the Senſe of the Common Law, but ſuch as receive an immediate Authority from the King, the Perſon intruſted with the executive Power, of the Law.

The Bill in Chancery is Evidence againſt the Complainant, for the Allegations of every Man's Bill ſhall be ſuppoſed true; nor ſhall it be ſuppoſed to be preferred by Counſel or Solicitor without the Party's Privity, and therefore it amounts to the Confeſſion and Admittance

1 Sid. 221. 1 Cha. Ca. 64, 65.

mittance of the Truth of any Fact, and if the Counſel has mingled in it any Fact that is not true, the Party may have his Action: But there muſt be Proceedings upon it, for if there were no Proceedings upon it, it ſhould rather be ſuppoſed to be filed by a Stranger to bar the Party of his Evidence.

If a Patron ſues the Parſon on a Bond, and the Parſon prefers his Bill in Chancery to be relieved, ſtating it to be a ſimoniacal Contract; the Bill and Proceedings upon it may be given in Evidence on Ejectment, in order to make void the Parſon's Living.

Fitz G. 196. But on an Iſſue directed out of Chancery to try the Validity of a Deed, where one *J. N.* was produced to prove he wrote it by the Direction of Lord *Ferrers* in 1720, and, to contradict his Evidence, the Plaintiffs produced a Bill in Chancery, preferred in 1719, by the Defendant, which mentioned the Deed, the Court would not ſuffer it to be read, though an Anſwer had been put in, becauſe it was no more than the Surmiſes of Counſel for the better Diſcovery of the Title. However, in all Caſes, where the Matter is ſtated by the Bill as a Fact on which the Plaintiff founds his Prayer of Relief, it will be admitted in Evidence, and amount to Proof of a Confeſſion.

Analogous therefore to this is a Confeſſion under the Party's Hand by Letter or otherwiſe; however, there is a great Difference between the Manner of giving them in Evidence. A Bill is proved by ſhewing there has been Proceedings upon it, for it muſt be ſuppoſed

poſed to be the Party's Bill, where his Adverſary has been compelled, by the Proceſs of the Court of Chancery, to anſwer it. But the Confeſſion by Letter muſt be proved to be of the Party's Hand Writing; and, where Nobody ſaw the Writing, that muſt be by the Compariſon of Hands. Now the Reaſon why the Compariſon of Hands is allowed to be Evidence, is, becauſe Men are diſtinguiſhed by their Hand Writing, as well as by their Faces; for it is very ſeldom that the Shape of their Letters agree any more than the Shape of their Bodies. Therefore the Likeneſs induces a Preſumption that they are the ſame; and every Preſumption that remains unconteſted, hath the Force of an Evidence.

But in the Caſe of High Treaſon, Compariſon of Hands is not ſufficient for the original Foundation of an Attainder, becauſe there muſt be Proof of ſome Overt Act, and Writing is not an Overt Act; but it may be uſed as a circumſtantial and confirming Evidence, if the Fact be otherwiſe proved. And in any other criminal Proſecution it will be Evidence the ſame as in a civil Suit; as on the Indictment for Writing a treaſonable Libel, the Proof of the Hand Writing will be ſufficient without a Proof of the actual Writing. The Caſe of the Seven Biſhops went upon the Witneſs not being enough acquainted with their Hand Writing, and not upon the Nature of the Evidence.—In general Caſes the Witneſs ſhould have gained his Knowledge from having ſeen the Party write, but under ſome Circumſtances that is not neceſſary; as where the

2 Hawk. P.C. 431. Ld. Raym 40.

Ca. K. B. 72.

Taylor's Caſe 25 G. 2. at Stafford.

the Hand Writing to be proved is of a Perſon reſiding abroad, one, who has frequently received Letters from him in a Courſe of Correſpondence, would be admitted to prove it, though he had never ſeen him write. So where the Antiquity of the Writing makes it impoſſible for any living Witneſs to ſwear he ever ſaw the Party write: As where a Parſon's Book was produced to prove a Modus, the Parſon having been long dead, a Witneſs, who had examined the Pariſh Books, in which was the ſame Perſon's Name, was permitted to ſwear to the Similitude of the Hand Writing, for it was the beſt Evidence in the Nature of the Thing, for the Pariſh Books were not in the Plaintiff's Power to produce.

Per. Canc. 6. D. 1736.

If the Bill be Evidence againſt the Complainant, much more is the Anſwer againſt the Defendant, becauſe this is delivered in upon Oath. But then when you read an Anſwer, the Confeſſion muſt be all taken together, and you ſhall not take only what makes againſt him; for the Anſwer is read, as the Senſe of the Party himſelf, and if it is taken in this Manner, you muſt take it intire and unbroken; therefore, if upon Exceptions taken, a ſecond Anſwer has been put in, the Defendant may inſiſt upon having that read, to explain what he ſwore in his firſt Anſwer.

2 Vern. 194. 288.

5 Mod. 10. 1 Sid. 418.

An Infant's Anſwer, by his Guardian, ſhall never be admitted as Evidence againſt him on a Trial at Law, for the Law has that Tenderneſs for the Affairs of Infants, that it will not ſuffer him to be prejudiced by the Guardian's Oath. So the Anſwer of a Truſtee can in no

2 Vent. 72.

3 Mod. 259.

Caſe

Caſe he admitted as Evidence againſt *Ceſtui que Truſt*.

A Bill was brought by Creditors againſt an Executor to have an Account of a perſonal Eſtate; the Executor ſet forth by Anſwer, that there were eleven hundred Pounds left by the Teſtator in his Hands, and, that coming afterwards to make up Accounts, he gave the Teſtator a Bond for a Thouſand Pounds, and the Hundred Pounds were given him for his Trouble and Pains that he had employed in the Teſtator's Buſineſs, and there was no other Evidence in the Cauſe that the Hundred Pounds were depoſited; and it was argued, that the Anſwer, though it was put in Iſſue, ſhould be allowed to diſcharge him; ſince there was the ſame Rule of Evidence at Equity as at Law: But it was anſwered and reſolved in Court, that, when an Anſwer was put in Iſſue, whatever was confeſſed and admitted, need not be proved; but it behoved the Defendant to make out by Proofs, whatever was inſiſted upon by Way of Avoidance. But this was held under the Diſtinction, where the Defendant admitted a Fact, and inſiſted on a diſtinct Fact by Way of Avoidance, there he ought to prove that Matter of Defence, becauſe it may be probable, that he admitted it out of Apprehenſion that it might be proved, and therefore ſuch Admittance ought not to profit him, ſo far as to paſs for Truth, whatever he ſays in Avoidance. But if it had been one Fact, as if the Defendant had ſaid the Teſtator had given him a Hundred Pounds it ought to have been allowed, unleſs diſproved; Cowper 1707 Hil. Vac'.

ved; becauſe nothing of the Fact charged is admitted, and the Plaintiff may diſprove the whole Fact, if he can do it.

Salk. 286. Though an Anſwer is good Evidence againſt the Defendant, yet it is not againſt his Alienee; nor is it any Evidence for the Defendant in a Court of Law (except ſo ordered by the Court on an Iſſue out of Chancery) unleſs the Plaintiff had made it Evidence by producing it firſt. As where on an Iſſue out of Chancery to try the Terms of an Agreement, which was proved by one Witneſs, but denied by the Defendant, the Witneſs being Dead before the Trial, the Plaintiff was under a Neceſſity of producing the Bill and Anſwer in order to read his Depoſition, and by that Means made the whole Anſwer Evidence, which was accordingly read by the Defendant.

Bourn *and* Sir Thomas Whitmore, Salop. 1747.

Sparin et al' *v* Drax, M. 27 C. 2. C. B. at Bar. But, where an Anſwer in Chancery of the Witneſs was produced to ſhew him incompetent; he having there ſwore, that he had an Annuity out of the Land in Queſtion; Serjeant *Maynard* inſiſted to have the Anſwer read through, but the Court refuſed it, as the Anſwer was produced only to ſhew, that he was not a competent Witneſs in the Cauſe, and not to prove the Iſſues.

Analogous to this is a Man's mere voluntary Affidavit, which may alſo be read againſt him; however, there is great Difference between the Manner of giving them in Evidence.

An Anſwer is proved by ſhewing the Bill, which is the Charge, and the Anſwer, which is, as it were, the Defence, and this, in civil Caſes, ſhall be intended to be ſworn, becauſe

becauſe the Defence in Chancery is upon Oath. But a mere voluntary Affidavit is no Part of any Cauſe in a Court of Juſtice, and therefore it muſt be proved to be ſworn; for if you only prove it ſigned by the Party, the Proof goes no farther than to ſupport it as a Note or Letter, and as ſuch you may give it in Evidence without more Proof.

The ſecond Difference between them is, that the Copy of an Anſwer may be given in Evidence, but the Copy of a voluntary Affidavit cannot. The Reaſon is, becauſe the Anſwer is an Allegation in a Court of Judicature, and, being a Matter of public Credit, the Copy of it may be given in Evidence, for the Reaſons formerly given. But a voluntary Affidavit has no Relation to a Court of Juſtice, and therefore is not intitled to public Credit, and being a private Matter, the Affidavit itſelf muſt be produced as the beſt Evidence; beſide it muſt be proved to be ſworn, which it cannot be without it is produced; and for this Reaſon the Office Copy of an Anſwer is not ſufficient Evidence for an Indictment for Perjury, though perhaps ſuch Copy would be ſufficient for the Grand Jury to find the Bill. But, upon the Trial, the Original muſt be produced, and poſitive Proof made, that the Defendant was ſworn, by a Witneſs who was acquainted with him; though perhaps Proof that a Perſon calling himſelf *J. S.* was ſworn, and that he ſigned the Anſwer or Affidavit, and Proof alſo by another Witneſs of the Hand Writing, would be

3 Mod. 116.

Chambers *and* Robinſon, Tr. 12 G. 1.

Carth. 220.

be ſufficient. But no Return of Commiſſioners (nor even a Maſter in Chancery) of the Party's Swearing will be ſufficient, without ſome one being preſent to prove the Identity of the Perſon.

3 Mod, 107.

Godb. 326. The next Thing is the Depoſitions, and they may be read when the Witneſs is dead, for when the Witneſs is living, they are not the beſt Evidence the Nature of the Thing is capable of.

2. They may be read when a Witneſs is ſought and cannot be found, for then he is in the ſame Circumſtances, as to the Party that is to uſe him, as if he were dead.

1 Mod. 283. 3. If it is proved that a Witneſs was ſubpœna'd, and fell Sick by the Way, for, in this Caſe likewiſe, the Depoſition is the beſt Evidence that can be had, and that anſwers what the Law requires

4. A Depoſition cannot be given in Evidence againſt any Perſon that was not Party to the Suit; and the Reaſon is, becauſe he had not Liberty to croſs examine the Witneſs; and it is againſt natural Juſtice, that a Man ſhould be concluded by Proofs in a Cauſe to which he was not a Party. For this Reaſon Depoſitions in Chancery ſhall not be read for or againſt the Party Defendant upon an Information or Indictment, for the King was no Party to the Suit.

Yet this Rule admits of ſome Exceptions; as in the Caſe of Cuſtoms and Tolls, and, in general, in all Caſes where Hearſay and Reputation are Evidence; for undoubtedly what a Witneſs, who is dead, has ſworn in a Court of

of Juſtice, is of more Credit, than what another Perſon ſwears he has heard him ſay.—So a Depoſition taken in a Cauſe between other Parties will be admitted to be read, to contradict what the ſame Witneſs ſwears at a Trial. Sparin *and* Drax.

Depoſitions taken thirty Years ſince were admitted to be read in Chancery, though the Parties were not the ſame, inaſmuch as the Cauſe related to the ſame Lands, and the Tertenants were Parties to it, and thoſe Witneſſes are ſince dead; the Plaintiff's Title then not appearing; and this is an Indulgence of the Chancery beyond the ſtrict Rules of the Common Law, and it is admitted for pure Neceſſity, becauſe Evidence ſhould not be loſt: But, 1 Cha. Ca. 73

5. A Man ſhall not regularly take Advantage of a Depoſition who was not a Party to the Suit, for, as he cannot be prejudiced by the Depoſition, he ſhall never receive any Advantage from it. Hard. 472.

6. Depoſitions before an Anſwer put in are not admitted to be read, unleſs the Defendant appears to be in Contempt; for if there does not appear to be a Cauſe depending, the Depoſitions are conſidered as voluntary Affidavits; but if the adverſe Party had been in Contempt, then the Depoſitions ſhall be admitted, for then it is the Fault of the Objector that he did not croſs examine the Witneſſes. Raym. 335. 4 Mod. 147.

If a Witneſs be examined *De bene eſſe*, and before the Coming in of the Anſwer, the Defendant not being in Contempt, the Witneſs Hardr. 315.

neſs dies, yet the Depoſitions ſhall not be read becauſe the oppoſite Party had not the Power of croſs Examination; and the Rule of the Common Law is ſtrict in this, that no Evidence ſhall be admitted but what is, or might have been, under the Examination of both Parties: But, in ſuch Caſes, the Way is to move the Court of Chancery, that ſuch a Witneſs's Depoſition ſhould be read, and if the Court ſee Cauſe, they will order it, and this Order will bind the Parties to aſſent to the Reading.

2 Jon. 164.

Formerly they did not inroll their Bill and Anſwer, and therefore ancient Depoſitions may be given in Evidence without the Bill and Anſwer. So Depoſitions taken by the Command of Queen *Elizabeth* upon Petition, without Bill and Anſwer, were, upon ſolemn Hearing in Chancery, allowed to be read.

Hob. 112.

Alſo the ancient Practice was, that they never publiſhed the Depoſitions in the Lifetime of the Witneſſes, becauſe the Depoſitions *in perpetuam Rei Memoriam*, were of no Uſe till after the Death of the Witneſſes; but the Practice was found very inconvenient, becauſe thereby Witneſſes became ſecure in Swearing whatever they pleaſed, inaſmuch as they never could be proſecuted for Perjury.

1 Ch. Rep. 175. 1 Raym. 735.

When the Bill is diſmiſſed, becauſe the Matter is not proper for Equity to decree, yet Depoſitions on the Fact in the Cauſe may be read afterwards in a new Cauſe between the ſame Parties; for though the Matter is not proper for Equity to decree, yet there was a Cauſe properly before the Court, for it is proper

proper for the Juriſdiction of Equity to conſider how far the Law ought to be relaxed and moderated; and where there is a Cauſe properly before the Court, however that Cauſe may be decided, the Depoſitions muſt be Evidence. But if a Cauſe be diſmiſſed for the Irregularity of the Complaint, the Depoſitions can never be read; as where a Deviſee, upon a Suit depending by his Deviſor, brings his Bill of Revivor, and after Depoſitions taken the Bill is diſmiſſed, becauſe a Deviſee cannot bring a Bill of Revivor; upon a new original Bill the Deviſee cannot uſe the Depoſitions in the former Cauſe; for there being no Cauſe regularly before the Court there could be no Depoſition in it.

In croſs Cauſes, an Agreement was proved in one of the Cauſes, and in that it was not ſet forth in the Allegations of the Bill or Anſwer: In the other Cauſe the Agreement was ſet forth, but not proved; an Order was obtained before Publication, that the ſame Depoſitions ſhould be read in both Cauſes, and this might well be; for ſince the Order was before Publication in the ſecond Cauſe, the Defendant had Liberty to croſs examine the Witneſſes on what Particulars he pleaſed, and the Sight of the Depoſitions was to his Advantage. 1 Ch. Rep. 236.

From what has been ſaid it is Evident, that a voluntary Affidavit is no Evidence between Strangers, becauſe there is no croſs Examination.

It is a general Rule, that Depoſitions taken in a Court not of Record ſhall not be allow-

2 R. Ab. 679. Lit. R. 167. ed in Evidence elſewhere. So it has been holden in Regard to Depoſitions in the Eccleſiaſtical Court, though the Witneſſes were dead. So where there cannot be a croſs Examination, as Depoſitions taken before Commiſſioners of Bankrupts, they ſhall not be read in Evidence, yet if the Witneſſes examined on a Coroner's Inqueſt are dead, or beyond Sea, their Depoſitions may be read; for the Coroner is an Officer appointed on behalf of the Public, to make Inquiry about the Matters within his Juriſdiction; and therefore the Law will preſume the Depoſitions before him to be fairly and impartially taken.—And by 1 & 2 *Ph. & M. C. B.* and 2 & 3 *Ph. & M. c.* 10. Juſtices of the Peace ſhall examine of Perſons brought before them for Felony, and of thoſe who brought them, and certify ſuch Examination to the next Gaol-Delivery; but the Examination of the Priſoner ſhall be without Oath, and the others upon Oath, and theſe Examinations ſhall be read againſt the Offender upon an Indictment, if the Witneſſes be dead.

1 Liv. 180. 2 Jones. 53.

Sherwin *v.* Clarges, M. 12 W. 3. Another Way of perpetuating the Teſtimony of a Perſon deceaſed, analogous to this of giving Depoſitions in Evidence, is by giving the Verdict in Evidence, and the Oath of the Party deceaſed—As to which the Rule is, that when you give in Evidence any Matter ſworn at a former Trial, it muſt be between the ſame Parties, becauſe otherwiſe you diſpoſſeſs your Adverſary of the Liberty to croſs examine: Beſide otherwiſe, as you cannot regularly give the Verdict in Evidence,

dence, you cannot give the Oath on which it is founded, for if you cannot ſhew there there was ſuch a Cauſe, you cannot ſhew there was ſuch a Perſon examined in it, and without ſhewing there was a Cauſe, no Man's Oath can be given in Evidence, inaſmuch as it appears to be no more than a voluntary Affidavit.

What a man himſelf, who is living, has ſworn at one Trial, can never be given in Evidence at another to ſupport him, becauſe it is no Evidence of the Truth; for if a Man be of that ill Mind to ſwear falſly at one Trial, he may do the ſame at another on the ſame Inducements; but what a Man ſays in Diſcourſe, without Premeditation or Expectation, of the Cauſe in Queſtion, is good Evidence to ſupport him, becauſe that ſhews that what he ſwears is not from any undue Influence. But if a Man has ſworn at one Trial different from what he has ſworn at another, this is good Evidence as to his Diſcredit.

On an Appeal for Murder, the Plaintiff cannot give the Indictment in Evidence againſt the Priſoner, and what a Perſon ſwore upon it at the Trial, for as the Indictment cannot be Evidence (between other Parties) by Conſequence the Oath on the Indictment cannot be Evidence: And as the Evidence on the Indictment cannot be ſhewed by the Plaintiff, in the Appeal, neither can it by the Defendant, for the Reaſon already given in regard to giving Verdicts in Evidence. 1 Sid. 325.

However, to this general Rule there are the ſame Exceptions, as have been already taken Notice of in regard to Depoſitions.

Per Holt, 14 14 W. 3. at G. Hall.

A Verdict with the Evidence given in an Action brought by the Carrier for Goods delivered to him to be carried, ſhall be given in Evidence in an Action brought by the Owner againſt the Carrier for the ſame Goods, for it is ſtrong Proof againſt him that he had the Plaintiff's Goods; and, in caſe the Witneſs is dead, or cannot be found, is the beſt Evidence that can be had, for it amounts to a Confeſſion in a Court of Record.

1 Str. 162.

Note; Though the bare producing the Poſtea is no Evidence of the Verdict, without ſhewing a Copy of the final Judgment, becauſe it may happen that the Judgment was arreſted, or a new Trial granted; yet it is good Evidence that a Trial was had between the ſame Parties, ſo as to introduce an Account of what a Witneſs ſwore at that Trial, who is ſince dead. So a Nonſuit, with Proof of the Evidence upon which the Plaintiff was nonſuit, may be given in Evidence in another Action brought by the ſame Party.

Paſc. 5 An. C. B.

2 Mod. 231.

A Decree in Chancery may be given in Evidence between the ſame Parties, or all claiming under them, for their Judgments muſt be of Authority in theſe Caſes, where the Law gives them a Juriſdiction; for it were very abſurd, that the Law ſhould give them a Juriſdiction, and yet not ſuffer what is done

done by force of that Juriſdiction to be full Proof.

So a decretal Order in Paper, with Proof of the Bill and Anſwer (or if they are recited in the Order) may be read. 1 Keb. 21.

And Note; Where-ever a Matter comes to be tried in a collateral Way, the Decree, Sentence, or Judgment, of any Court, Eccleſiaſtical or Civil, having competent Juriſdiction, is concluſive Evidence of ſuch Matter: and in caſe the Determination is final in the Court, of which it is a Decree, Sentence, or Judgment, ſuch Decree, Sentence, or Judgment, will be concluſive in any other Court, having concurrent Juriſdiction.

In Conſequence of the firſt Part of this Rule; If in Ejectment a Queſtion aroſe about the Marriage of the Father and Mother of the Plaintiff, a Sentence in the Eccleſiaſtical Court in a Cauſe of Jactitation, would be concluſive Evidence. So where the Defendant in an Action of Aſſault and Battery juſtified a Mayhem, done by him as an Officer in the Army, for diſobeying Orders, and gave in Evidence the Sentence of the Council of War, upon a Petition againſt him by the Plaintiff, and the Petition being diſmiſſed by the Sentence, it was held concluſive Evidence in favour of the Defendant. So in an Action upon a Policy of Inſurance, with a Warranty, that the Ship was *Swediſh*, the Sentence of a *French* Admiralty Court condemning the Ship, as *Engliſh* Property, was held concluſive Evidence. So in an Action of Carth. 225. Lane *and* Degberg. Hill. 11 W. 3.

Price, Bar. at Bodmin, 1716.

Trover for Goods, Judgment of Condemnation upon an Information in the Exchequer would be concluſive. So in the Caſe before put, Judgment of Ouſter was allowed to be concluſive Evidence of the Ouſter of a third Perſon, the Mayor, by whom the Defendant was admitted.

But this Part of the Rule muſt be taken with this Reſtriction, that the Matter determined by ſuch Decree, Sentence, or Judgment, was determined *ex directo*, and not in a collateral Way. Therefore if in an Information againſt *A.* Iſſue was taken on *J. S* being Mayor of ſuch a Borough in ſuch a Year, and it was found he was not Mayor, ſuch finding and Judgment thereon would not be Evidence on the like Iſſue in an Information againſt *B.* So if a Suit was inſtituted in the Eccleſiaſtical Court by *B.* againſt *C.* for a Divorce *Cauſa Adulterii* with *D.* and ſhe was to plead that ſhe was married to *D.* and upon Proof made, the Court ſhould ſo pronounce, and accordingly diſmiſs *B*'s Libel; yet that would be no Evidence in an Ejectment in which the Marriage between *C.* and *D.* came in Diſpute. So if in an Ejectment between a Deviſee and the Heir at Law, the Defendant obtained a Verdict upon Proof that the Will was not duly executed, yet he could not give it in Evidence on another Ejectment brought by another Deviſee: But if upon a Bill filed againſt him in Chancery to eſtabliſh the Will, he was to obtain a Verdict on an Iſſue of *Deviſavit vel non*, directed

Robins's Caſe, in C. B. 1760

to

to try the Validity of ſuch Will, and the Bill was accordingly diſmiſſed; ſuch Verdict and Decree of Diſmiſſal ought to be admitted as concluſive Evidence in any Action of Ejectment brought againſt him; becauſe the Matter having been *ex directo* determined by a Court, having competent Juriſdiction, ought not to be tried again by any other Court in a collateral Way.

In Conſequence of the ſecond Part of the Rule, If *A.* having killed a Perſon in *Spain* was there proſecuted, tried, and acquitted, and afterwards was indicted here, he might plead the Acquittal in *Spain* in Bar; becauſe a final Determination in a Court having competent Juriſdiction is concluſive in all Courts of concurrent Juriſdiction. So in Dower, if the Defendant pleads *Ne unques Accouple*, and upon this Iſſue the Biſhop certifies a Marriage, and ſuch Certificate is inrolled, and Judgment given for the Demandant thereon; in the like Action againſt any other Tenant, the Defendant will be concluded from pleading the like Plea; for the Fact having been *ex Directo* determined between the Parties, ſo that it can never again be controverted by them, the Record is concluſive Evidence of ſuch Fact againſt all the World. Hutchinſon's Caſe, Temp. Car. 2.

Though a Conviction in a Court of criminal Juriſdiction is concluſive Evidence of the Fact, if it afterwards comes in Controverſy in a Court of Civil Juridiction, yet an Acquittal in ſuch Court is no Proof of the Reverſe. As ſuppoſe the Father convicted on an Indictment for having two Wives, this would be

3 Mod. 164. concluſive Evidence in an Ejectment, where the Validity of the ſecond Marriage was in Diſpute. But an Acquittal would not prevent the Party from giving Evidence of the former Marriage, ſo as to bar the Iſſue of the ſecond; for an Acquittal aſcertains no Fact as a Conviction does, nor would a Conviction be concluſive, ſo as to bar the Party in a Writ of Dower or Appeal, where the Legality of the Marriage comes in queſtion, though it would be Evidence before the Biſhop on the Iſſue *Ne Unques Accouple*; for though the Fact of the Marriage is not concluſive Evidence of the Legality of it, yet it is *Prima facie* a Proof of it.

Jacques's Caſe.

Kord Howard v. Lady Inchiquin, 1700

1 R. Ab. 678. If a Man deviſe Lands by Force of the Statute of *H.* 8. of Wills, or by Cuſtom, the Probate of the Will in the Spiritual Court cannot be given in Evidence, for all the Proceedings, as far as relate to Lands, are *coram non Judice*, for they have no Power to authenticate any ſuch Deviſe, and therefore a Copy produced under their Seals is no certain Evidence of a true Copy.

But the Probate of a Will is good Evidence as to the perſonal Eſtate, becauſe they have the Cuſtody of all Wills that concern the perſonal Eſtate, and they are the Records of that Court, and therefore a Copy of them under the Seal of that Court muſt be good Evidence; and this is ſtill the more reaſonable, becauſe it is the Uſe of the Court to preſerve the original Wills, and only to give back to the Party the Copy of the Will under the Seal of the Court.

The

The Eccleſiaſtical Court never grant an Exemplification of Letters of Adminiſtration, but only a Certificate that Adminiſtration was granted; therefore where a Leſſee pleads an Aſſignment of a Term from an Adminiſtration, ſuch Certificate is good Evidence. So would the Book of the Eccleſiaſtical Court, wherein was entered the Order for granting Adminiſtration. So would the Copy of the Probate of the Will be Evidence of *S. S.* being Executor, but a Copy of the Will would not be Evidence of it. Kempton *and* Croſs, E. 8. G. 2. K. B. 1 Lev. 25. Smartle *and* Williams, cited by Herdw. Canc.

Where a Perſon in Ejectment would prove the Relation of a Father and Son by his Father's Will, he muſt have the original Will, and not the Probate only, for where the Original is in being, the Copy is no Evidence; beſide, the Seal of the Court does not prove it a true Copy, unleſs the Suit only related to perſonal Eſtate. But the Ledger Book is Evidence in ſuch a Caſe, becauſe this is not conſidered merely as a Copy, but is a Roll of the Court; and though the Law does not allow theſe Rolls to prove a Deviſe of Lands, yet when the Will is only to prove a Relation, the Rolls of the Spiritual Court, that has Authority to inroll all Wills, are ſufficient Proof of ſuch Teſtament. And under particular Circumſtances the Ledger Book may be Evidence in a Deviſe of a real Eſtate; as where in an Avowry for a Rent Charge the Avowant could not produce the Will under which he claimed, that belonged to the Deviſee of the Land; but produced the Ordinary's Regiſter Petit *and* Petit, 1701. Ld. Raym. 744. Ca. K. B. 375.

giſter of the Will, and proving former Payments, it was held ſufficient Evidence againſt the Plaintiff, who was Deviſee of the Land charged. But it has been often held that the Copy of the Ledger Book is not Evidence, yet, ſince the Original would be read as a Roll of the Court without further Atteſtation, it ſeems fit the Copy ſhould be read. The contrary Practice has been founded upon the Miſtake, that the Ledger Book is read as a Copy, ſo that the Copy of that is but the Copy of a Copy: Whereas the Ledger Book is read as a Roll of the Court.

Raym. 405,6. 1 Sid. 359. Though in a Suit relating to a perſonal Eſtate, the Probate of the Will under the Seal of the Eccleſiaſtical Court is ſufficient Evidence, yet the adverſe Party may give in Evidence, that the Probate is forged, becauſe ſuch Evidence ſuppoſes that the Spiritual Court has given no Judgment, and ſo there is no Reaſon for the Temporal Court to be concluded by it.—So the adverſe Party may 1 Sid. 359. prove that the Teſtator left *bona Notabilia*, againſt the Probate by an inferior Court, for then ſuch Court had no Juriſdiction.

1 Sid. 359. So if Letters of Adminiſtration be ſhewn under Seal, you may give in Evidence, that they were revoked, for this is in Affirmance of the Proceedings in the Spiritual Court, and does not at all controvert the Righteouſneſs of their Deciſion.

And

And now to take Notice of other public Matters, which are not Records.

1. The Rolls of a Court Baron are Evidence, for they are the public Rolls, by which the Inheritance of every Tenant is preſerved, and they are the Rolls of the Manor Court, which was anciently a Court of Juſtice relating to all Property within the Diſtrict.

2. The Regiſter of Chriſtnings, Marriages, and Burials, is good Evidence, or the Copy of it. Nay, Proof *Vivâ Voce* of the Contents of it without a Copy has been admitted; yet the Propriety of ſuch Evidence may well be doubted, becauſe it is not the beſt Evidence the Nature of the Thing is capable of. 2 Sid. 71. Noy 146. Godol. 164.

Where it appeared in Evidence that the Regiſter was made from a Day Book, that was kept by the Miniſter for that Purpoſe, yet the Day Book will not be admitted to contradict the Entry in the Regiſter, *Ex. gr.* to prove a Child baſe-born, no Notice being taken of that in the Regiſter, which was therefore produced to prove him legitimate. May *and* May 2 Str. 1703.

3. The Pope's Licence without the King's has been held good Evidence of an Impropriation, becauſe anciently the Pope was held for ſupreme head of the Church, and therefore was held to have the Diſpoſition of all ſpiritual Benefices, with the Concurrence of the Patron, without any Regard had of the Prince of the Country; and theſe ancient Matters muſt be judged according to the Error of the Times, in which they were tranſacted. 1 Palm. 427.

Palm. 38. 4. A Pope's Bull is Evidence upon a ſpecial Preſcription to be diſcharged of Tythe; where you only ſay, that the Lands belonged to ſuch a Monaſtery, and were diſcharged at the Time of the Diſſolution, for then they continue diſcharged by the Act of Parliament; But it is no Evidence on a general Preſcription to be diſcharged, becauſe that would ſhew the Commencement of ſuch a Cuſtom, and a general Preſcription is that there was no Time or Memory of Things to the contrary.

Hob. 188. 5. If the Queſtion be whether a certain Manor be ancient Demeſne or not, the Trial ſhall be by Domeſday Book, which will be inſpected by the Court.

Gregory *and* Withers, Hil. 28 Car. 2. In Ejectment for the Manor of *Artam*, the Defendant pleaded ancient Demeſne, and when Domeſday Book was brought into Court, would have proved, that it was anciently called *Nettam*, and that *Nettam* appears by the Book to be ancient Demeſne; but he was not permitted to give ſuch Evidence, for if the Name is varied it ought to have been averred on the Record.

6. To know whether any thing be done in or out of the Ports, there lies in the Exchequer a particular Survey of the King's Ports, which aſcertain their Extent.

7. An old Terrier or Survey of a Manor, whether Eccleſiaſtical or Temporal, may be given in Evidence, for there can be no other Way of aſcertaining the old Tenures or Boundaries.

A Ter-

A Terrier of Glebe is not Evidence for the Parſon, unleſs ſigned by the Church-wardens, as well as the Parſon, nor then neither, if they be of his Nomination; and though it be ſigned by them, yet it ſeems to deſerve very little Credit, unleſs it is likewiſe ſigned by the ſubſtantial Inhabitants; but in all Caſes it is certainly ſtrong Evidence againſt the Parſon.

8. Rolls or ancient Books in the Herald's Office are Evidence to prove a Pedigree; but an Extract of a Pedigree, proved to be taken out of Records, ſhall not, becauſe ſuch Extract is not the beſt Evidence in the Nature of the Thing, as a Copy of ſuch Records might be had. 2 Jones 224.

9. *Camden's Britannia* would not be Evidence to prove a particular Cuſtom; but a general Hiſtory may be given in Evidence to prove a Matter relating to the Kingdom in general; as in the Caſe of *Neal* and *Jay* Chronicles were admitted to prove, that King *Philip* did not take the Stile in the Deed at that Time, *Charles* V. of *Spain* not having then ſurrendered. Ca. K. B. 85. Salk. 281.

10. The Regiſter of the Navy Office, with Proof of the Method there uſed to return all Perſons dead, with the Mark *Dd.* is ſufficient Evidence of a Death. P. 6. An. C. B. ex dem. Whitcomb.

11. An Inventory taken by a Sheriff on an Execution is Evidence between Strangers to prove the Quantity and Value of the Goods for the Law intruſting him with the Execution muſt truſt him throughout. 2 Keb. 277.

We

We come now in the ſecond Place to that which is only private Evidence between Party and Party, and that is alſo two-fold, either Deeds or other Matters of an inferior Nature.

1. Of Deeds.

The Rule is, That when any Perſon claims by a Deed in the Pleadings, he ought to make a *Profert* of it to the Court, and where he would prove any Fact in Iſſue by a Deed, the Deed itſelf muſt be ſhewn.

In every Contract there muſt be apt Words to ſhew what Right is transferred, and to whom, and the Senſe and Signification of theſe Words muſt be expounded by the Law. There muſt therefore be a *Profert* made of all Solemn Contracts: 1. For the Security of the Subject; that what Right is transferred may be adjudged of according to the Rules of Law. 2. Becauſe all Allegations in a Court of Juſtice muſt ſet forth the Thing demanded; now the Thing demanded cannot be ſet forth without ſhewing the Inſtrument upon which the Demand ariſes.

6 Co. 38. a. But where a Man ſhews a good Title in himſelf, every thing collateral to that Title ſhall be intended, whether it be ſhewn or not.

A Matter collateral to a Title is what does not enter into the Eſſence or being of a Title, but ariſes *aliunde*, ſo that there muſt Co. Lit. 310. be a Derivation of Title without it. As Cr. E. 401. where a Man declares of a Grant or Feoffment of a Manor, the Attornment (which is collateral

lateral to the Title) ſhall be intended. So in Treſpaſs the Defendant conveys the Houſe in which, *&c.* by Feoffment from *J. S.* and juſtifies Damage feaſant; the Plaintiff replies that *J. S.* before the Feoffment made a Leaſe to *J. N.* who aſſigned to him; the Defendant rejoins, that the Leaſe was made on Condition, that if *J. N.* aſſigned over without Licence by Deed from *J. S.* that then *J. S.* ſhould re-enter; the Plaintiff ſurrejoins, that *J. S.* did by Deed give Licence, without making a *Profert* of the Deed; and yet this Surr. joinder was allowed to be good, becauſe the Plaintiff's Title was by Aſſignment of the Leaſe from *J. N.* and conſequently the Licence of *J. S.* is but a Matter collateral to the Aſſignment, and by Conſequence the Deed muſt be intended to be well and legally made, though it be not ſhewn to the Court. 6 Co. Bellamy's Caſe Cro. Ja. 102.

But there is another Difference, and that is, where the Deed is neceſſary *ex Inſtitutione Legis*, and where it is neceſſary *ex Proviſione Hominis*; for where the Deed is neceſſary *ex Inſtitutione Legis*, there you muſt ſhew it; for it is repugnant that the Law ſhould require a Deed, and not put you to ſhew that Deed, when it is made; as if you are obliged to ſhew the Attornment of a Corporation, there you muſt ſhew a Deed, inaſmuch as incorporate Bodies by the Rules of Law cannot act but by incorporate Inſtruments, therefore no Attornment is ſhewn, unleſs a Deed is ſhewn alſo: But where a Deed is neceſſary *ex Proviſione Hominis*, there when it is collateral, as in the Caſe of a Licence before 6 Co. 38.

fore mentioned, it need not be ſhewn, for the private Act of the Parties ſhall not controul the Judgment of the Law, that intends all ſuch collateral Matters without ſhewing.

Co. Lit 267. 10 Co. 92. Nor can Privies in Eſtate take any Advantage of a Deed without ſhewing it; as if there be Tenant for Life, the Remainder in Fee, and there be a Releaſe to him in Remainder, Tenant for Life cannot take Advantage of it without ſhewing the Deed; for ſince the Right paſſes merely by the Deed, to ſay any Perſon releaſed without ſhewing the Deed will not be a good Plea.

And to explain this Matter further, A Difference is to be taken between Things that lie in Livery and Things that lie in Grant; for Things that lie in Livery may be pleaded without Deed, but for a Thing that lies in Grant, regularly a Deed muſt be ſhewn.

2 R. A. 682. Therefore a Man may plead that *J. S.* enfeoffed him, without ſaying *per Indenturam*, and yet give the Indenture in Evidence, becauſe the Feoffment is made by the Livery, and the Indenture is only Evidence of ſuch Feoffment.

Co. Lit. 281. But if a Man pleads that *J. S.* enfeoffed him by Deed, it may reaſonably be doubted whether he can give a parol Feoffment in Evidence, becauſe he has bound himſelf up to a Feoffment by Deed.

And though ſince the Statute of Frauds the Ceremony of Livery only, is not ſufficient to paſs an Eſtate of Freehold or Term of Years, but there muſt be a Deed or Note in Writing, yet it is not neceſſary to ſet out ſuch Contract

tract in the Pleadings, for they are, as they were formerly, *Feoffavit et demiſit.*

A Man may plead a Condition to determine an Eſtate for Years without Deed, for it begins without any Livery, and therefore the Party is not eſtopped by any notorious Ceremony from averring the Condition; but where a Man ſets out a Feoffment, the other Party may reply that it was by Deed, and ſhew the Condition, for then there is an Eſtoppel againſt an Eſtoppel, and ſo the Matter is in equal Balance, and therefore muſt be determined according to Truth.

Things that lie in Grant are all Rights, as Fairs, Markets, Advowſons, and Rights to Land where the Owner is out of Poſſeſſion, and as they cannot viſibly be delivered over, therefore they muſt paſs by the next Sort of Conveyance, that holds the ſecond Place in Point of Solemnity, and that is by Grant under the Hand and Seal of the Party. Co. Lit. 225.

Now a Perſon that claims any Thing lying in Grant muſt ſhew his Deeds, or otherwiſe he muſt prescribe in the Thing he pretends to, and the Preſcription being ſuppoſed immemorial, ſupplies the Place of a Grant. 10 Co. Dr. Liſield's Caſe.

He alſo that has a particular Eſtate by Agreement of the Parties, muſt ſhew not only his own Conveyance but the Deeds Paramount, for there can be no Title made to a Thing lying in Agreement but by ſhewing ſuch Agreement up to the firſt original Grant. 10 Co. 93.

But where any Perſons claim any particular Eſtate by Act in Law, they may make Ibid. 94.

their Claim without ſhewing the Deeds; as Tenant in Dower, or by Elegit, or Guardian in Chivalry, may claim an Eſtate in a Thing lying in Grant without ſhewing the Deed; for when the Law creates an Eſtate, and yet does not give the particular Tenant the Property of the Deeds, it muſt allow the Eſtate to be demanded without them.

Co. Lit. 225 b. So they may plead a Condition without ſhewing the Deed, becauſe they claim an Eſtate by Act of Law, and therefore are not eſtopped by the Act of Livery, and therefore they may claim an Eſtate defeated by the Condition without a Deed.

10 Co. 94. But Tenant by the Courteſy cannot claim any Eſtate lying in Grant without the Deed, becauſe he has the Property in, and Cuſtody of, the Deeds in Right of his Wife, and that Property cannot be diveſted out of him during the Continuance of his Eſtate.

Co. Lit. 226. So alſo he cannot defeat an Eſtate of Freehold without ſhewing the Deed, for the Act of Livery is an Eſtoppel that runs with the Land, and bars all Perſons to claim it by virtue of any Condition, without that Condition appears in a Deed, and ſince the Cuſtody of the Deed reſides with him, he muſt ſhew the Condition.

Ibid. But where a Perſon is an utter Stranger to any Deed, there in Pleading he is not compelled to ſhew it. As if a Man mortgages his Land, and the Mortgagee letteth the Land for a Year reſerving Rent, and then the Condition is performed, and the Mortgagor re-enters; the Leſſee in Bar of an Action of Debt may

may plead the Condition and Re-entry without ſhewing the Deed, for the Leſſee was never entitled to the Cuſtody of the Deed.

So if a Man bring a Precipe againſt him, Ibid.
he may plead, that he was only a Mortgagee, and that the Condition was performed, ſo that he has no longer Seiſin of the Eſtate, and this without ſhewing the Deed; for upon Performance of the Condition the Property of the Deed is no longer in the Mortgagee, but it ought to be rebailed to the Mortgagor.

So in an Action of Waſte, or in Diſcharge 10 Co. 94.
of the Anceſtor's Rent, the Tenant pleads a Grant of the Reverſion and Attornment after, the Tenant need not ſhew ſuch Grant.

As no Party ſhall take Advantage of his own Negligence in not keeping of his Deeds, which in all Caſes ought to be fairly produced to the Court; ſo his Adverſary ſhall not take any Advantage in his violent detaining of them; for the one by the violent taking away of the Deeds gives a juſt Excuſe to the other for not having them at Command; and no Man can ever take Advantage of his own Injury; and therefore it is a good Plea for one Party to ſay, that the other entered and took away the Cheſt in which the Deeds were.

Letters Patent inrolled in the ſame Court, Co. Lit. 225 b.
or Records of the ſame Court, need not be proffered to the Court, but a Deed inrolled muſt; for all Records that are public Acts, and that lie for the Direction of that Court in Matters of Judicature, muſt be taken Notice of, and therefore they need but be referred to with a *prout patet per Recordum*, for the Court will

take Notice of the Courſe and Orders of the Court upon Reference to them. But Deeds inrolled are no more than the private Acts of the Parties authenticated by the Court, and they do not lie for the Direction of the Court, but take hold of the Authority of the Court to give them Credit, and therefore the Court does not take Notice of them unleſs they be pleaded.—But by 10 *An.* *c.* 18. where any Bargain and Sale inrolled is pleaded with a *Profert*, the Party to anſwer ſuch *Profert* may produce a Copy of the Inrolment.

5 Co. 74. Since the Term to avoid entering the ſeveral Continuances of Buſineſs is reckoned as one continued Law Day; therefore the Deeds pleaded ſhall be in the Cuſtody of the Law during the whole Term, being the Day wherein they are pleaded; and being then before the Court, any Body may take Advantage of them; but ſince they belong to the Cuſtody of the Party, if the Deed be not denied, it ſhall go back to the Party after the Term is over, and then no body can take Advantage of it without a new *Profert*. Therefore the Plaintiff in *K. B.* may take Advantage of the Condition of a Deed in his Replication, becauſe it runs, *et prædictus A. dicit*, as of the ſame Term; but he cannot take Advantage in his Replication of a Deed in *C. B.* becauſe they enter an Imparlance to another Term. But where the Deed comes in and is denied, it remains in Court till the Plea is determined; therefore while it is tied up to this Court, and is impoſſible to be removed, it ſhall be pleaded in another without

Co. Lit. 231. b.

out ſhewing. And if on the Iſſue of *Non eſt Factum* it is found againſt the Deed, it ſhall be kept in Court for ever, to hinder any more Uſe being made of it. Salk. 215.

In an Action of Debt upon Bond, it is Matter of Subſtance to make a *Profert* of the Deed, becauſe it is the Contract on which the Court ought to found their Judgment, and therefore it ought to be exhibited to the Court. But it is not matter of Subſtance to ſhew Letters of Adminiſtration, for whether they are legally granted or not belongs to the Cognizance of the Spiritual Court, and therefore their Legality cannot be weighed at Common Law. Cr. Jac. 32. 2 Sand. 402.

Secondly, Of giving Deeds in Evidence to the Jury.

And the general Rule is, that the Deed itſelf muſt be given in Evidence and be proved by one Witneſs at the leaſt.

But there are ſome Exceptions to the general Rule of giving the Deed itſelf in Evidence.

1. Where the Deed is proved to be in the Hands of the oppoſite Party, who upon being called upon, refuſes to produce it, a Copy of it will be good Evidence; but ſuch Copy ought to be proved by a Witneſs who has compared it with the Original, for otherwiſe there is no Proof of its being a true Copy. 1 Mod. 94.

For the ſame Reaſon, where a Will remains in Chancery by order of the Court, a Copy may be given in Evidence, becauſe the Original is not in the Power of the Party. So 1 Keb. 117. 10 Co. 92.

where it is proved that the Deed itſelf is deſtroyed by Fire, a Copy of it may be given in Evidence; but perhaps in ſuch Caſe, if it came out in Evidence that there were two Parts executed, and the Loſs of one only was proved, a Copy would not be admitted. So if it was proved that the Deed came into the Hands of the Defendant's Brother, under whom the Defendant claims, a Copy ought to be read, even though the Defendant has ſwore in an Anſwer in Chancery that he has not got the Original.—And in theſe Caſes, if the Party has no Copy, he may produce an Abſtract, nay, even give a parol Evidence of the Contents. And where Poſſeſſion has gone along with the Deed many Years, the Original of which is loſt or deſtroyed, an old Copy or Abſtract may be given in Evidence without being proved to be true, becauſe in ſuch Caſe it may be impoſſible to give better Evidence.

Thurſton *and* Delahay, Hereford Aſſ. 1729.

Pritcherd *and* Symonds, Hereford, 1744.

Bartlet *and* Gowler, Tr. 14 G. 2.

Style 205.

As to the ſecond Part of the Rule, the Deed muſt be proved to the Jury by one Witneſs at leaſt; for though the Deed be produced under Hand and Seal, and the Hand of the Party is proved, yet that is no full Proof of the Deed; for the Delivery is neceſſary to the Eſſence of the Deed, and there is no Proof of a Delivery but by a Witneſs who ſaw it.

Ca. K.B. 500. But to this Part of the Rule there are likewiſe Exceptions. As where the Witneſs to a Deed being ſubpœnaed did not appear, but to prove it the Party's Deed, they proved an Indorſment, reciting a Proviſo within, that

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if he paid ſuch a Sum, the Deed ſhould be void, and acknowledging that the Sum was not paid, and by the Indorſement he expreſly owned it to be his Deed, and upon this it was read. So it has been held, that a Deed to lead the Uſes of a Fine or Recovery may be read without Proof of its being executed; the Reaſon of which ſeems to be, that by the Fine being levied it appears the Parties intended to convey the Land to ſome Uſe or other, and therefore the Law will admit of ſlight Proof to ſhew what Uſe was intended; ſince the ſlighteſt Proof, without other to contradict it, will turn the Preſumption on that Side; and therefore though a Counterpart of a Deed without other Circumſtances is not Evidence in other Caſes, yet it is in the Caſe of a Fine and Recovery. However, in a Caſe reſerved from *Hereford* Aſſizes, by Mr. Juſtice *William Forteſcue*, all the Judges were of Opinion that ſuch a Deed, to lead the Uſes of a Fine, muſt be proved, and therefore it ſeems as if the Caſe in *Salk.* likewiſe is not Law.

Glaſcock *and* Sir William Darrel, H. 12. W. 3.

Salk. 217.

Griffith *and* Moore.

It has been ſaid that a Deed of a Bargain and Sale inrolled, may be given in Evidence without proving the Execution of it, becauſe the Deed by Law does need Inrolment, and therefore the Inrolment ſhall be Evidence of the lawful Execution: But that where a Deed needs no Inrolment, there, though ſuch Deed be inrolled, yet the Execution of it muſt be proved; becauſe, ſince the Officer is not intruſted by the Law to inrol them, the Inrolment will be no Evidence of the

5 Co. 54. Style 445. Hob. 117. Salk. 280.

Execution, and the Caſes in the Margin are cited in Support of this Doctrine. However, the Law may well be doubted, notwithſtanding that Deeds of Bargain and Sale inrolled, have frequently in Trials of *Niſi Prius* been given in Evidence without being proved. In Support of which Practice, the Caſe of *Smartle* and *Williams* in *Salk.* is much relied on; but that Caſe is wrong reported; for it appears by 3 *Lev.* 387. that the Acknowledgment was by the Bargainor, and ſo it is ſtated in *Salk.* MS. beſide it appears from both the Books, that it was only a Term that paſſed, and conſequently it was no Inrolment within the Statute.

Style 462. If divers Perſons ſeal a Deed, and one of them acknowledge it, it may be inrolled, and may ever after be given in Evidence as a Deed inrolled; but it would be of very miſchievous Conſequence to ſay therefore, that a Deed inrolled upon the Acknowledgment of a bare Truſtee, might be given in Evidence againſt the real Owner of the Land without proving it executed by him. However, that has been the general Opinion, and it ſeems fortified in ſome Degree by 10 *An. c.* 18. before taken Notice of.

On the other Hand, it ſeems as abſurd to ſay, that a Releaſe which has been inrolled upon the Acknowledgment of the Releaſor, ſhould not be admitted in Evidence againſt him without being proved to be executed, becauſe ſuch Releaſe does not need Inrolment, and, in Fact, ſuch Deeds have often been admitted; and that was the Caſe of *Smartle*

Smartle and *Williams*, the Deed did not need Inrolment, yet being inrolled on the Acknowledgment of the Bargainor, it was read againſt him without being proved.

So if the Deed be thirty Years old it may be given in Evidence without any Proof of the Execution of it: However, there ought to be ſome Account given of the Deed, where found, *&c.* And if there be any Blemiſh in the Deed by Raſure or Interlineation, the Deed ought to be proved, though it were above thirty Years old, by the Witneſſes, if living, and if they are dead, by proving the Hand of the Witneſſes, or at leaſt one of them, and alſo the Hand of the Party ought to be proved, in order to encounter the Preſumption ariſing from the Blemiſhes in the Deed; and this ought more eſpecially to be done if the Deed imports a Fraud; as where a Man conveys a Reverſion to one, and after conveys it to another, and the ſecond Purchaſer proves his Title; becauſe in ſuch Caſe the Preſumption ariſing from the Antiquity of the Deed, is deſtroyed by an oppoſite Preſumption; for no Man ſhall be ſuppoſed guilty of ſo manifeſt a Fraud. Ghettle *and* Pound, Hil. Aſſ. 1701.

A Deed may be given in Evidence on a Rule of Court, by Conſent, without being proved, for the Conſent of Parties is concluſive Evidence, for the Jury are only to try ſuch Facts wherein the Parties differ. 1 Sid. 269.

Though a Deed of Feoffment be proved to be duly executed, yet that is not ſufficient to convey a Right, unleſs Livery of Seiſin is likewiſe proved. However, where the Deed 1 R. 132.

is

is proved, and Poſſeſſion has always gone with the Deed, there Livery ſhall be preſumed, though it be not proved: But if Poſſeſſion has not gone along with the Deed, then the Livery muſt be proved; for ſince Livery is to give Poſſeſſion on the Deed, where there is no Poſſeſſion the Preſumption is, that there was no Livery, and conſequently Livery muſt be proved to encounter that Preſumption. If the Jury find a Deed of Feoffment, and that Poſſeſſion has gone along with the Deed, yet, unleſs they expreſly find a Livery, the Court cannot adjudge it a good Conveyance; for they are only Judges of what is Law, and have nothing to do with any Probability of Fact; therefore they cannot conclude that there was a lawful Conveyance, unleſs the Jury find a Delivery of the Fee.

Humberton *and* Howgil, Hob 72.

If the Iſſue be *Feoffavit vel non*, and a Deed of Feoffment and Livery are proved, it cannot ve given in Evidence, that it was made by Covin to defraud Creditors; for it is a Feoffment *tiel quel*, and the Covin ought to have been ſpecially pleaded; *aliter*, if the Iſſue be *ſeiſed or not ſeiſed*, for he remains ſeiſed as to Creditors, notwithſtanding the Feoffment.

This leads me to take Notice of the ſeveral Acts of Parliament that have been made to prevent fraudulent Conveyances and the Determinations thereupon, that it may be ſeen by what Evidence a Conveyance may be defeated after the Execution of it has been proved.

By 13 *Eliz. cap.* 5. for the avoiding and aboliſhing of feigned covenous and fraudulent

lent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments, and Executions, as well of Lands and Tenements as of Goods and Chattels, contrived to delay, hinder, or defraud, Creditors and others of their juſt and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries, and Reliefs; it is enacted, That all and every Feoffment, Gift, Grant, Alienation, Bargain, and Conveyance, of Lands and Tenements, Hereditaments, Goods and Chattels, by Writing or otherwiſe, and all and every Bond, Suit, Judgment, and Execution, had or made for any Intent or Purpoſe before declared, ſhall be taken (only as againſt them whoſe Action, *&c.* by ſuch covenous Practice is diſturbed, delayed or defrauded) to be void; any Pretence, Colour, feigned Condition, expreſſing of Uſe or other Matter, or Thing to the contrary notwithſtanding; provided it ſhall not extend to any Eſtate, or Intereſt in Lands or Tenements, Goods or Chattels, had, made, conveyed, or aſſured upon good Conſideration and *bona Fide* to any Perſon not having at the Time of ſuch Conveyance or Aſſurance, Notice of ſuch Covin, Fraud, or Colluſion.

It ſeems ſettled, that no Conveyance ſhall be deemed fraudulent within this Statute, unleſs it can be proved that the Perſon was indebted at the Time, or very near, ſo that they may be connected together, though there have been Determinations to the contrary both by Sir *J. Jekyl* and *Forteſcue*, M. of *R.* Waller *and* Burrows, in Canc. 1745. Taylor *and* Jones, 1743.

A. be-

Twyne's Caſe, 3. Co. 80.

A. being indebted to *B.* in 400 *l.* and to *C.* in 200 *l.* *C.* brings Debt, and hanging the Writ, *A.* makes a ſecret Conveyance of all his Goods and Chattels to *B.* in Satisfaction of his Debt, but continues in Poſſeſſion, and ſells ſome, and ſets his Mark on other Sheep; and held to be fraudulent within this Act: 1. Becauſe the Gift General. 2. The Donor continued in Poſſeſſion, and uſed them as his own. 3. It was made pending the Writ, and it is not within the Proviſo, for though it is made on a good Conſideration, yet it is not *bona fide*. But yet in all Caſes the Donor continuing in Poſſeſſion, is not a Mark of Fraud; as where Donee lends Donor Money to buy the Goods, and at the ſame Time takes a Bill of Sale of them for ſecuring the Money.

Ca. K. B. 287.

Baker *and* Lloyd, 1706. per Holt, C. J.

If *A.* makes a Bill of Sale to *B.* a Creditor, and afterwards to *C.* another Creditor, and delivers Poſſeſſion at the Time to neither, and afterwards *C.* gets Poſſeſſion, and, *B.* takes them from him, *C.* cannot maintain Treſpaſs, becauſe though the firſt and ſecond Bill of Sale are both fraudulent againſt Creditors, yet they both bind *A.* and *B.*'s is the elder Title.

Hawns *and* Leader, 2 Cr. 270.

No Perſon can take Advantage of this Statute but the Creditors themſelves, and therefore, where *A.* made a fraudulent Gift of his Goods to *B.* and then died, *B.* brought an Action againſt *A.*'s Adminiſtrator for the Goods, and held he could not plead the Statute, or maintain the Poſſeſſion of the Goods, even to ſatisfy Creditors; but the Cre-

Creditors may charge the Vendee as Executor *de ſon tort*.

Judgment againſt *T. K.* who died, and *Scire Facias* againſt the Tenants, the Sheriff returned *B.* a Tertenant, who came in and pleaded that *T. K.* enfeoffed him long before the Judgment *abſque hoc*, that he was ſeiſed at the Time of the Judgment, or at any Time after, whereupon Iſſue, and the Jury find the Feoffment, but further add, that it was by Covin to defraud the Plaintiff and other Creditors, and Judgment for the Plaintiff; for *T. K.* remained ſtill ſeiſed as to the Creditors, notwithſtanding the Feoffment, but if the Iſſue had been taken directly, enfeoffed or not enfeoffed, it had been found againſt the Plaintiff, for it is a Feoffment *tiel quel*. Hob. 72.

A Settlement being voluntary is only an Evidence of Fraud, yet it has always been reckoned ſufficient, in reſpect to Creditors; but where a Father and Son join in making a Settlement, though after Marriage, yet it ſhall be taken to be a Bargain, and therefore will of itſelf make a Conſideration, but that muſt be where neither could make ſuch a Settlement alone. Hammond *and* Ruſſel, M. 12 G. 2. in Canc'.

So a Settlement after Marriage, the Portion being paid at the ſame Time, is good againſt Creditors. So it has been held, that a Settlement after Marriage, recited to be in Conſideration of a Portion ſecured, ſhall be preſumed to be in purſuance of an Agreement previous to the Marriage, though no Proof of it, and ſo good againſt Creditors. Pr. in Ch. 426. Ibid. 101.

R. ſur-

Pr. in Ch. 275 *R.* ſurrenders a Copyhold to his Son, afterwards on a Treaty of Marriage for his Son, he tells the Wife's Friends this Copyhold was ſettled, in conſideration of which, and ſome Leaſehold Lands, the Marriage was had, and two thouſand Pounds Portion paid; and upon this the Surrender was held not to be voluntary or fraudulent as againſt Creditors.

Ibid. 113. The Wife joined with the Huſband in letting in an Incumbrance upon her Jointure, and barring the Intail, and then the Uſes were limited to the Huſband for Life, Remainder to the Wife for Life, Remainder to the Sons in Tail, Remainder to the Daughters in Tail who were not in the former Settlement; and held they were not Purchaſers, ſo as to ſhut out a Judgment Creditor, though the Wife's parting with her Jointure had been a good Conſideration to them if it had been ſo expreſſed.

Lewkner *and* Freeman, Equit. Caſes Abr. 149. *A.* brought an Action againſt *M.* for lying with his Wife; *M.* before Judgment, made a Conveyance of his Land in Truſt for Payment of Debts mentioned in a Schedule. *A.* recovered five thouſand Pounds, and brought a Bill to be relieved againſt the Deed as fraudulent; but it was held not to be ſo, either in Law or Equity; for this being a Debt founded *in malitia*, it was conſcientious to prefer his real Creditors before it.

Gooch's Caſe, 5 Co. 60. Where the Heir made a fraudulent Conveyance to defraud his Father's Creditors, it was held, the Creditor might take Advantage of this Statute, upon the Iſſue *Riens per Diſcent*. However, ſince the 3 & 4 *W.* & *M.* *c.* 14.

c. 14. after mentioned, this Point cannot come in Queſtion.

The next Statute to be taken Notice of is 27 *Eliz.* 4. which enacts that every Conveyance, *&c.* of, in, or out of any Lands, *&c.* had or made for the Intent or Purpoſe to defraud and deceive ſuch Perſons as ſhall purchaſe in Fee, for Life or Years, the ſame Land, *&c.* ſhall be deemed only as againſt that Perſon, and thoſe claiming under him, to be void. Provided it ſhall not extend to impeach any Conveyance for good Conſideration, and *bona fide*. And if any Perſon ſhall make any Conveyance with a Clauſe of Revocation, and after ſuch Conveyance ſhall bargain, ſell, convey, or charge the ſame Land for Money or other good Conſideration paid or given (the firſt Conveyance, *&c.* not by him revoked according to the Power reſerved) the former Conveyance, *&c.* as againſt the ſaid Barganees, Vendees, *&c.* ſhall be deemed void, provided that no lawful Mortgage made *bona fide*, and without Fraud, upon good Conſideration, ſhall be impeached by this Act.

Upon this Statute it hath been held, That if a Man, having a future Power of Revocation, ſells the Land before the Power commences, yet it is within the Act. So if the Power of Revocation be reverſed with the Conſent of *A.* who is one within his Power. 3 Co. 82. 2 Jon. 94.

A Deed, though it be fraudulent in its Creation, yet by Matter *ex poſt facto* may become good; as if one makes a fraudulent Feoffment, and the Feoffee makes a Feoffment 1 Sid. 134. 3 Lev. 387.

ment to another for valuable Conſideration, and afterwards Feoffor for valuable Conſideration makes a ſecond Feoffment.

Brown *and* Jones, M. 1744.

If the Brother has in his Hands any of his Siſter's Money, and refuſes to pay it to her Huſband, unleſs he will make a Settlement upon her, ſuch Settlement will not be fraudulent.

Note; Whatever Conveyance is fraudulent againſt Creditors, will be ſo againſt ſubſequent Purchaſers; for the 27 *Eliz.* has always received the moſt liberal Conſtruction.

5 Co. 6.

Note likewiſe, a ſubſequent Purchaſer having Notice of ſuch Conveyance is of no Conſequence, for the Statute expreſly avoids ſuch Conveyances.

6 Co. 72. b.

If the Father makes a fraudulent Leaſe of his Land, in order to deceive the Purchaſer, and dies before he makes any Conveyance, and after his Son conveys to *J. S.* for valuable Conſideration, *J. S.* ſhall avoid the Leaſe.

Hatton *and* Neal, in Surry, 1683.

Upon Not guilty in Treſpaſs the Defendant gave in Evidence Articles by which Sir *Robert Hatton* (under whom the Plaintiff claimed as Heir) ſold the Defendant three hundred of the beſt Trees in ſuch a Wood, to be taken between ſuch a Time and ſuch a Time; Sir *Robert* died, and the Defendant, within the Time, took the Trees, upon which the Plaintiff proved, that Sir *Robert* was only Tenant in Tail, but this was a voluntary Settlement of Sir *Roberts* own; and *Jones*, Chief Juſtice, held clearly that this Sale being proved

to be for a valuable Conſideration, bound the Heir as a Caſe within this Act; beſide the Settlement was with a Power of Revocation, and the Plaintiff was nonſuit.

No Purchaſer ſhall avoid a precedent Conveyance for Fraud or Covin, but he who is a Purchaſer for Money or other valuable Conſideration. 3 Co. 83.

Tenant in Tail articled to ſettle his Land in ſtrict Settlement, his Wife dying, and he having only Daughters, levies a Fine, and declares the Uſes to himſelf for Life, with a Power to make a Jointure, Remainder to his firſt and other Sons in Tail, afterwards marries, and executes the Power as to the Jointure, but ſhewing the Deed makes no Settlement on the Iſſue, has a Son, and dies; the Daughters bring a Bill to have the Articles carried into Execution, and decreed; for the Son cannot be conſidered as a Purchaſer, there being no particular Contract to make him ſo. White *and* Sanſom, in Canc. 1746.

The next Statute is 3 & 4 *W. & M. c.* 14. and that enacts, That all Wills, Diſpoſitions and Appointments of any Lands, *&c.* ſhall be deemed, as againſt any Creditor of the Deviſor, to be fraudulent and of none Effect: with a Proviſo that any Deviſe or Diſpoſition for the Raiſing or Payment of any juſt Debt, or any Portion for any Child, other than the Heir at Law, in Purſuance of any Marriage Contract, or Agreement in Writing *bona fide* made before Marriage, ſhall be in full Force.

Kynaſton *and* Clark, in Canc. 1741.

A Tenant for Life, Remainder to his firſt and other Sons in Tail, Remainder to his own right Heirs for ever, entered into a Bond, and died, his Son entered, deviſed away the Eſtate, and died without Iſſue. This Deviſe of the Reverſion was held within this Act, for the Heir is Debtor being bound in the Bond.

By 1 *Jac. c.* 15. *ſ.* 5. it is enacted, That if any perſon, who ſhall afterwards become a bankrupt, ſhall convey or cauſe to be conveyed to any of his Children, or other Perſon, any Lands or Chattels, or transfer his Debts into other Men's Names, except upon Marriage of any of his Children (both the Parties married being of the Years of Conſent) or ſome valuable Conſideration, the Commiſſioners may convey or diſpoſe thereof, the ſame as if the Bankrupt had been actually ſeiſed or poſſeſſed, and ſuch Sale or Diſpoſition of the Commiſſioners ſhall be good againſt the Bankrupt, and ſuch Children and Perſons, and all others claiming under them.

21. *Jac.* 1. *c.* 19. *ſ.* 11. recites, That many Perſons before they become Bankrupts convey their Goods upon good Conſideration, yet ſtill keep the ſame, and are reputed Owners thereof, and diſpoſe of the ſame as their own; and therefore enacts, That if any Perſons ſhall become Bankrupt, and at ſuch Time ſhall, by the Conſent and Permiſſion of the true Owner, have in their Poſſeſſion, Order and Diſpoſition, any Goods or Chattels, whereof they ſhall be reputed Owners, the Commiſſioners may diſpoſe of them for the Benefit of the Creditors.

Upon

Upon this Clauſe it has been held, that Poſſeſſion of Lands being no Proof of Title as Poſſeſſion of Goods is, a Mortgager continuing in Poſſeſſion is not within this Clauſe if he deliver up the Title Deeds; but a Mortgage of Goods, where Poſſeſſion does not go along with the Sale, is within it, unleſs it be a Choſe in Action, and there, as Poſſeſſion cannot be delivered, Delivery of the Muniments and Means of reducing it into Poſſeſſion, is ſufficient, for the Delivery of the Muniments is in Law a Delivery of the Thing itſelf; as a Delivery of the Key of a Warehouſe is a Delivery of the Goods in it; but Things fixed to the Freehold, till ſeparated, are Part of the Freehold, and therefore of them a Mortgage will be good without a Delivery.

Ryal *and* Rowles, Hil. 23 G. 2. in Cane.

Note; There may be a Delivery from one Parcener to another, or of Things in Parcenary to a third Perſon. Goods left in the Bankrupt's Poſſeſſion for ſafe Cuſtody only ſeem not to be within this Clauſe: So Goods left with the Bankrupt to ſell, for one who deals by Commiſſion, can gain no Credit by his viſible Stock.

1 Will. 318.

By the Statute of Frauds, all Deviſes of Land muſt be in Writing, and ſigned by the Party deviſing the ſame, or by ſome other Perſon in his Preſence, or by his expreſs Directions, and atteſted and ſubſcribed in the Preſence of the Deviſor by three or more credible Witneſſes.

If a Will is atteſted by two Witneſſes, and afterwards the Teſtator makes a Codicil, which he declares to be Part of his Will,

Lee. *and* Lib. Carth. 35.

and that is likewiſe atteſted by two Witneſſes, yet it will not be a good Will within the Statute. But if a Man publiſhes his Will in the Preſence of two Witneſſes, who ſign it in his Preſence, and a Month after he ſends for a third Witneſs, and publiſhes it in his Preſence, this will be good.

Jones *and* Lake, Hil. 16. G. 2.

2 Ch. Ca. 109. S. P.

Show. 69.

Lord Chief Juſtice *Holt* appears to have been once of Opinion, that it was neceſſary that the Teſtator ſhould ſign the Will in the Preſence of the Witneſſes; but it ſeems to have been ſince ſettled, to be ſufficient for him to own it before them to be his Hand.

2 Williams 506.

3 Williams 254.

The Statute of Frauds requires Atteſting in the Teſtator's Preſence, to prevent obtruding another Will in the Place of the true one. But it is enough if the Teſtator might ſee, it is not neceſſary he ſhould actually ſee them Signing; therefore, where the Teſtator had deſired the Witneſſes to go into another Room ſeven Yards Diſtance to atteſt it, in which there was a Window broken, through which the Teſtator might ſee them, it was held good. So if the Teſtator, being ſick, ſhould be in Bed, and the Curtain drawn. Note; Signing need not be by ſetting the Name to the Bottom, it is enough if the Will be of the Teſtator's Hand Writing, and begins with I *J. S. &c.* and it has been ſaid, that Sealing is Signing, and was ſo determined in the Caſe of *Wangford* and *Wangford*, by Lord *Raymond*, at *Guildhall*. But this may well be doubted, becauſe the Meaning of the Statute, in requiring it to be ſigned by the Teſtator, was for a further

Sheers *and* Glaſcock, 2 Salk. 688.

Lemayn *and* Stanly, 3 Lev.

Webb *and* Greenville, H. 12. G. 2.

E. 13 G. 1. Str. 764.

further Security againſt Impoſition, which can be only by his putting his Name or Mark; and of this Opinion was the Court of Exchequer in a late Cauſe, grounding themſelves upon the Opinion of Mr. *J. Levinz* in *Lemain* and *Stanly*, and the Caſe there cited by him out of 1 *R. A.* 245. 25. And if a Man makes a Will on three Pieces of Paper, and there are Witneſſes to the laſt Paper, and none of them ever ſaw the firſt, this is not a good Will. But though the Statute requires the Atteſtation of the Witneſſes to be in the Preſence of the Teſtator, yet it need not appear upon the Face of the Will to have been ſo done, but it is Matter of Evidence to be left to a Jury.

Lea *and* Lib.

2 Str. 1109.

Though the common Way is to call but one Witneſs to prove the Will, yet that is only where there is no Objection made by the Heir; for he is intitled to have them all examined, but then he muſt produce them, for the Deviſee need produce only one, if that one prove all the Requiſites; and though they ſhould all ſwear that the Will was not duly executed, yet the Deviſee would be permitted to go into Circumſtances to prove the due Execution; as was the Caſe of *Auſten* and *Willes*, cited by Lord *Hardwicke*, Chancellor, in *Blacket* and *Widdrington*, *M.* 11 *G.* 2. in which, notwithſtanding the three Witneſſes all ſwore to its not being duly executed, yet the Deviſee obtained a Verdict. And much the ſame Caſe happened in *Pike* and *Bradbury*, before Lord *Raymond*, upon an Iſſue of *deviſavit vel non*, the Witneſſes denying their Hands,

Per Lee C. J. in Anſty *and* Dowſing.

S. C. cited, Str. 1096.

Str. 1096.

the Deviſee would have avoided calling them, but being obliged to it, the firſt and ſecond denying their Hands, it was objected he ſhould go no further; for though if you call one Witneſs, who proves againſt you, you may call another, yet, if he proves againſt you too, you can go no farther; but the Chief Juſtice admitted him to call other Witneſſes to prove the Will, and he obtained a Verdict.

Anſty *and* Dowſing, E. 19 G. 2.

A Deviſee of any Part of the Eſtate, or a Legatee, where the Legacy is charged upon the Land, will not be a good Witneſs, nor would a Releaſe make them ſo, for that would not alter their Credibility at the Time of Atteſting. But if the Legacy is not charged upon the Land, whether the Legatee might, after being paid his Legacy, or having releaſed it, be a Witneſs to prove the Execution, may be doubtful, or perhaps he might without releaſing it, or being paid, for he is no ways concerned in Intereſt in the Queſtion; for the Will may ſtand for the perſonal Eſtate, though it is not good for the Real; but this Caution may be neceſſary where he is called to prove the Sanity of the Teſtator, which is indeed in ſome Reſpects the Caſe of every Witneſs who is called to prove the Execution.

To prevent the Inconveniencies ariſing from the above Determination, which would have ſet aſide many Wills, there being few in which ſome of the Witneſſes have not had Legacies by general Words charged upon Land, the 25 G. 2. enacts, That in all thoſe Caſes the Will

Will ſhall be good, and only the particular Legacy to the Witneſs void.

Though the Deviſee has proved the Will duly executed according to the Statute; yet if the Heir at Law can prove any Fraud in obtaining it, the Jury ought to find againſt the Will, for Fraud is in this Caſe examinable at Law and not in Equity. Bransby *and* Kerridge, 28 July 1728, in Dom. Proc'.

By the Statute of Frauds, a Will executed as before mentioned, ſhall continue in Force until the ſame be burnt, cancelled, torn or obliterated by the Teſtator, or in his Preſence, and by his Directions and Conſent, or unleſs the ſame be altered by ſome other Will or Codicil in Writing, or other Writing of the Deviſor, ſigned in the Preſence of three or more Witneſſes declaring the ſame.

If a Man deviſes his Land to *A.* and then makes a ſecond Will, and deviſes it to *B.* and upon that cancels the firſt Will by tearing off the Seal; if the ſecond Will be not good as a Will to paſs the Land to *B.* (the Witneſſes not having ſigned it in his Preſence) it will be no Revocation; neither will the tearing off the Seal, becauſe no ſelf-ſubſiſting independent Act, but done from an Opinion that the ſecond had revoked it. Onyons *and* Tyers, 1 Will. 345.

And Note; There are many other Ways of revoking a Will than what are mentioned in the Statute; as by levying a Fine of the Land deviſed. So if the Deviſor marries, and makes Settlement on the Iſſue, reſerving the Fee in himſelf, though he afterwards dies without Iſſue, *&c.* Lord Lincoln's Caſe, Sh. Parl. Ca. Martin *and* Savage, 1740.

We muſt next conſider, where Raſures and Interlineations, and where breaking off the Seal avoids the Deed.

10 Co. 92. Formerly, if there was any Raſure or Interlineation, the Judges determined upon the *Profert* or View of the Deed, whether the Deed was good or not: But when Conveyances grew ſo voluminous, ſuch vaſt Room was left for the Miſpriſion of the Clerk, that muſt be altered and amended, that the Courts thought it neceſſary not to diſcharge a Deed raſed or interlined as void upon the Demurrer, but referred it to the Jury, whether the Deed thus raſed or interlined was the individual Contract delivered by the Party.

11 Co. 27. If a Deed be altered by a Stranger in a Point not material, this does not avoid the Deed, but otherwiſe if it be altered by a Stranger in a Point material; for the Witneſſes cannot prove it to be the Act of the Party, where there is any material Difference, but an immaterial Alteration does not change the Deed, and conſequently the Witneſſes may atteſt it without Danger of Perjury. But if the Deed be altered by the Party himſelf, though in a Point not material, yet it avoids the Deed, for the Law takes every Man's own Act moſt ſtrongly againſt himſelf.

11 Co. 28. b If there be ſeveral Covenants in a Deed and one of them be altered, this deſtroys the whole Deed; for the Deed cannot be the ſame, unleſs every Covenant of which it conſiſts be the ſame alſo.

2 Ro. Ab. 29. If there be Blanks left in an Obligation in Places material, and filled up afterwards by Aſſent

Aſſent of Parties, yet is the Obligation void, for it is not the ſame Contract that was ſealed and delivered,—As if a Bond was made to *C.* with a Blank left for his Chriſtian Name and for his Addition, which is afterwards filled up. But if *A.* with a Blank left after his Name, be bound to *B*, and after *C.* is added as a joint Obligor, yet this does not avoid the Bond, for it does not alter the Contract of *A.* who was bound to pay the whole Money before any ſuch Addition. 1 Vent. 185.

It has been ſaid that where a Thing lies in Livery, a Deed formerly ſealed may be given in Evidence, though the Seal be afterwards broke off, for the Intereſt paſſed by the Act of Livery: So, they ſay, if the Conveyance were made by Leaſe and Releaſe, and the Uſes were once executed by the Statute, they do not return back again by cancelling the Deed: But it is ſaid, if a Man ſhews a Title to a Thing lying in Grant, there he fails if the Seal be torn off, for a Man cannot ſhew a Title to a Thing lying in ſolemn Agreement but by ſolemn Agreement, and there can be no ſolemn Agreement without Seal. However, it may well be doubted, whether this Diſtinction will hold. In *Palm.* 403. it was held, that a Deed leading the Uſes of a Recovery was good Evidence of ſuch Uſes, though the Seals were torn off, it being proved to have been ſo done by a young Boy; and, I take it, that in any Caſe a Deed ſo proved would be Evidence to be left to a Jury. But, perhaps, there may be a Difference where the Iſſue is directly on the Deed, and where the Palm. 403. 3 Bulſ. 79. 5 Co. 23. 3 Bulſ. 79.

Deed

Deed is only given in Evidence to prove another Iſſue. On *non eſt Factum* producing a Deed without Seal would not prove the Iſſue, however they might account for the Seal being torn off: But, on Not guilty in Ejectment, a Deed might be given in Evidence without Seal, and in Caſe they proved the Seal torn off by Accident, the Jury ought to find for the Party.

Cr Eliz. 110. Cwen 8. Lye. 57. If an Obligation were ſealed when pleaded, and after Iſſue joined, the Seal were torn off, yet the Plaintiff ſhall recover his Debt, becauſe the Deed when profered to the Court was in the Cuſtody of the Law, and therefore the Law ought to defend it; beſide, the Truth of the Plea which is to be proved muſt have Relation to the Time when the Iſſue was taken:

2 Inſt. 676. Alſo if the Seal of a Deed be broken off in Court, it ſhall be there enrolled for the Benefit of the Parties.

5 Co. 23. If there be a joint Contract or Obligation, and the Seals of one of the Obligors be torn off, it deſtroys the Obligation; but if they be ſeverally bound, the Obligation continues as

March 12. to the other whoſe Seal was not torn off, becauſe they are ſeveral Contracts. But if two Men be jointly and ſeverally bound, and the Seal of one of them be torn off, this is a Diſcharge of the other, for the Manner of the Obligation is deſtroyed by the Act of the Obligee; and therefore that is, according to the Rule of Law, that conſtrues every Man's own Act moſt ſtrongly againſt himſelf, a Diſcharge of the Obligation itſelf.

There

There is now by Act of Parliament a further Requiſite to a Deed that is given in Evidence than heretofore, and that is the Stamps: And there are now three Stamps required to every Deed; one by the 5 *W. & M. c.* 21. which commenced 28 *June* 1694; a ſecond by an Act commencing 1 *Auguſt* 1698; and the third by 12 *An. ſt.* 2. *c.* 9. commencing the 2 *Auguſt* 1714; and theſe ſtamps have been frequently the Means of detecting Forgeries; for the Stamp Office have ſecret Marks on the Stamps, which from time to time are varied; ſo that where a Deed is forged of a Date antecedent, it may eaſily be diſcovered by Stamps being upon it not in Uſe at the Time it bears Date.

To come now to other private written Evidence that is not under Hand and Seal.

And firſt of Notes; They are either ſuch as paſs according to the Cuſtom of Merchants, or that paſs between Party and Party.

Merchants Notes are in Nature of Letters of Credit paſſing between one Correſpondent and another, in this Form, "Pray pay to *J. S.* or Order, ſuch a Sum, Witneſs my Hand, *J. N.*" Now if the Correſpondent accept the Note he becomes chargeable in a ſpecial Action on the Cuſtom.

In this Cuſtom there are four Things conſiderable; firſt, the Bill; ſecondly, the Acceptance; thirdly, the Proteſt; fourthly, the Indorſement.

The Bill is in Nature of a Letter, deſiring the Correſpondent to pay ſo much Money either

either at Sight, or, as they Term it, at ſingle, double, or treble Uſance, which is commonly at one, two, or three Months, to be computed from the Date of the Bill: But as ſuch Uſances vary, it is neceſſary for the Plaintiff in his Declaration to ſhew what they are, elſe he cannot have Judgment.

Salk. 131.

The Bill till payable is ſubject to a Countermand, notwithſtanding it is accepted, therefore if the Correſpondent ſhould pay the Bill before the time appointed, and a Countermand ſhould come, the Drawer is not anſwerable, becauſe he gave no Authority to pay it before the Time.

6 Mod. 29.

Though regularly there ought to be three Perſons concerned in a Bill of Exchange, yet there may be only two; as if *A* draws in this Manner, "Pray pay to me or my Order, va-"lue received by myſelf."

The Acceptance is giving Credit to the Bill, ſo far as to make himſelf liable, and to truſt for a Repayment to his Correſpondent.

In the Caſe of two joint Traders, the Acceptance of the one will bind the other; But if ten Merchants imploy one Factor, and he draws a Bill upon them all, and one accepts it, this ſhall only bind him and not the reſt.

A ſmall Matter amounts to an Acceptance, as ſaying, "Leave the Bill with me, and I "will accept it;" for it is giving Credit to the Bill, and hindering the Proteſt; but if the Merchant ſay, "Leave the Bill with me, "and I will look over my Accounts between the

"the Drawer and me, and call To-morrow, "and accordingly the Bill ſhall be accepted." This is no Acceptance, becauſe it depends upon the Balance of the Accounts. And Acceptance may be qualified, as to pay half in Money and half in Bills; ſo to pay when Goods ſent by the Drawer are ſold. But he to whom the Bill is due may refuſe ſuch Acceptance, and proteſt the Bill, ſo as to charge the Drawer. The Proof of the Acceptance is a ſufficient Acknowledgment on the Part of the Acceptor, who muſt be ſuppoſed to know the Hand of his Correſpondent; therefore, in an Action againſt the Acceptor, the Plaintiff ſhall not be put to prove the Hand of the Drawer; however, Proof of the Acceptance will not be concluſive Evidence againſt the Acceptor, if he can prove the contrary.

Smith *and* Sear, E. 14. G. 2. Comb. 452.

Wilkinſon *and* Lutwich, M. 12 G. 1. Per Raym. Ch. J. at G. Hall. Str. 648.

The Proteſt is made before a Notary Public, in Caſe of Non-acceptance or Non-payment, to whoſe Proteſtation all foreign Courts give Credit, and the Proteſtation is Evidence that the Bill is not paid; but in *England* they muſt ſhew the Bill itſelf as well as the Proteſt, becauſe the whole Declaration muſt be proved.

When the Bill is returned proteſted, the Party that draws the Bill is obliged to anſwer the Money and Damages, or to give Security to anſwer the ſame beyond Sea, within double the Time the firſt Bill run for.

In

1 Raym. 743. In Caſe of foreign Bills of Exchange, the Cuſtom is, That three Days are allowed for Payment, and if not payed on the laſt Day, the Party ought to Proteſt the Bill and return it, and if he does not, the Drawer will not be chargeable; but if the laſt of the three Days is a *Sunday*, or great Holiday, he ought to demand the Money on the ſecond Day, and if not paid, proteſt it on the ſame Day, otherwiſe it will be at his own Peril. If the Indorſee accepts but Two-pence from the Acceptor, he can never have reſort to the Drawer.

If a Bill be left with a Merchant to accept, he to whom it is payable, in Caſe it is loſt, is to requeſt the Merchant to give him a Note for the Payment according to the Time limited in the Bill; otherwiſe there muſt be two Proteſts, one for Non-payment, the other for Non-acceptance.

A. draws a Bill on *B.* and *B.* living in the Country, *C.* his Friend accepts it, the Bill muſt not be proteſted for Non-acceptance of *B.* and then *C*'s Acceptance ſhall bind him to anſwer the Money.

If the Drawee indorſes the Bill over to another, the Receiver has not only the original Credit of the Drawer at Stake, and that of the Acceptor of the Bill, if accepted, but alſo of the Indorſor's, and he may have
Carth. 466. an Action againſt either; but a Bill of Exchange cannot be aſſigned over for a Payment in part, ſo as to ſubject the party to ſeveral Actions.

A. drew

A. drew a Bill of Exchange in the *Weſt Indies*, on *T.* in *London*, at ſixty Days Sight, to *W.* or Order. *W.* indorſed to *G.* who preſented the Bill to *T.* who refuſing, *G.* noted it for Non-acceptance, and at the End of ſixty Days proteſted it for Non-payment, and then wrote a Letter to *A.* and alſo to his Agent in the *Weſt Indies*, acquainting them that the Bill was not accepted. In an Action brought againſt *A.* by *G.* on this Caſe he was nonſuit, for by not ſending the Proteſt for Non-acceptance, he made himſelf liable. The Uſe of Noting is, that it ſhould be done the very Day of Refuſal, and the Proteſt may be drawn any Day after, by the Notary, and be dated of the Day when the Noting was made, and the ſixty Days would then begin to run, as to the Bill-holder, from the Date of the Noting; and where the Bill is accepted, the ſixty Days begin to run from the Acceptance. Gooſtrey *and* Mead, We. m. 1751.

It was doubtful whether Inland Bills of Exchange were within this Cuſtom of Merchants, but by 9 & 12 *W.* 3. *c.* 17. and 3 & 4 *An. c.* 9. they are put upon the ſame Foot with foreign Bills; and though they require the Acceptance to be in Writing, in order to charge the Drawer with Damages and Coſts, yet there is a Proviſo that it ſhall not extend to diſcharge any Remedy againſt the Accepter, ſo that an Action will ſtill lie on a parol Acceptance. 2 Str. 1000.

By the 3 & 4 *An. c.* 9. all Notes in Writing, that ſhall be made and ſigned by any Perſon, whereby ſuch Perſons promiſe to pay

pay to another or his Order, or unto Bearer, any Sum of Money mentioned in ſuch Note, ſhall be taken and conſtrued to be, by Virtue thereof, due and payable to ſuch Perſon to whom the ſame is made payable; and every Note made payable to any Perſon or his Order, ſhall be aſſignable or indorſable over, and the Perſon to whom ſuch Sum of Money is by ſuch Note made payable, may maintain an Action for the ſame; and any Perſon to whom ſuch Note is indorſed may maintain his Action, either againſt the Perſon who ſigned ſuch Note, or againſt him that indorſed it; and in every ſuch Action the Plaintiff ſhall recover his Damages and Coſts.

H. 18 G. 2. per C. B. Note; In a Writ of Inquiry before the Sheriff on a Judgment by Default in an Action on a Promiſſory Note, Plaintiff muſt prove his Note, the ſame as if Defendant had pleaded *Non aſſumpſit*, though in Debt on Bond and Judgment by Default it is otherwiſe.

Morris *and* Lee, P. 11. G. 1. Str. 629. Raym. 1396. There are no preſcribed Forms of theſe Promiſſory Notes, and therefore whatever imports an abſolute Promiſe to pay will be ſufficient; as a Promiſe to be acccountable to *J. S.* or Order. But a Promiſe to pay on an incertain Contingency, depending perhaps on the Will of the Drawer, is not within the Act, becauſe it will not anſwer the Intent, nor within the Words which import an abſolute Promiſe to pay, and therefore a Promiſe to pay upon his marriage is not good,

Baldwin's Caſe, E. 14. G. 2. Str. 1151.

Andrews *and* Franklyn, H. 3. G. 1. Str. 27.

Smith *and* Boheme, 2. Raym. 1396.

Appleby *and* G. 1. C. B.

Biddolph: Mod. Ca. L. & Eq. 363. Moor *and* Vaulute. E. 1

but

but a Promiſe to pay on the Return of a Ship has been held good, becauſe it reſpects Trade. So a Promiſe to pay, or do another Act, has been held not within the Act; as a Promiſe to pay, or deliver the Body of *J. S.* So a Promiſe to pay, if his Brother did not, is not within the Act, for the ſame Reaſon of Incertainty. So a Promiſe to pay three hundred Pounds to *B.* or Order, in three good *Eaſt India* Bonds, upon twenty-eighth of *November* following, is not a Note within the Statute: But a Promiſe to pay on the Death of another, as that is a Contingency which muſt happen, will be good. Coke *and* Coleham, M. 18 G. 2. Str. 1217.

In an Action againſt the Indorſor it need not be alledged, that it was demanded of the Drawer: But Lord *Holt*, *Raymond* and *Eyre* held it was neceſſary to give it in Evidence; Lord *Parker*, *Pratt*, *King* and *Hardwicke* held it was not neceſſary. But I take the Law to be now ſettled otherwiſe. A Bill payable to a Man's Order, is payable to himſelf, and he may bring an Action, averring he made no Order. Vide Poſt. Str. 8. 1 Salk. 130.

Though an Aſſignment of a Bill, payable to *J. S.* or Bearer, be no good Aſſignment to charge the Drawer, yet the Indorſor is liable, for the Indorſement is in Nature of a new Bill. Salk. 125.

A Note payable to a Feme Sole or Order, who marries, can only be indorſed by the Huſband. Ca. L. and E. 246. Str. 516, S. P.

So likewiſe ſuch Note may be indorſed by an Executor or Adminiſtrator. Str. 1260.

Hemming *and* Robinſon, M. 6 G. 2.
1 Barnes 317.

In an Action by the Indorſee againſt the Drawer, upon *Non aſſumpſit*, the Plaintiff proved the Drawer's Hand, and that when the Note with the Indorſement was ſhewn to the indorſor, he acknowledged it was his Hand Writing, but this was held not ſufficient to charge a third Perſon.

Goodman *and* Shipway, M. 11 G. 2. B. R.
Wilmow *and* Young, Per Eyre, G. Hall, M. 1. G. 2.
Helwick *and* Robinſon, H. 13 G. 1. Str. 147.

There is a Diſtinction between a Note payable to *B.* or Order, or to *B.* or Bearer; In the firſt Caſe, in an Action againſt the Indorſor, the Plaintiff muſt prove a Demand on the Drawer, but not in the laſt, for there the Indorſor is in Nature of an original Drawer. In the firſt Caſe, if the Indorſee gives Credit to the Drawer, without Notice to the Indorſor, it will diſcharge him: So receiving Part of the Money from the Drawer will for ever diſcharge the Indorſor; for by ſuch Receipt, the Indorſee has made his Election to have his Money from the Drawer.

Vaughan *and* Fuller, Str. 1246.
Salk. 127.

If the Indorſor has paid Part of the Money, that will diſpenſe with the Neceſſity of proving a Demand on the Drawer.

Note; He need not prove the Drawer's Hand, for if it is a forged Bill, yet the Indorſor is liable.

Truby *and* Dela Fountain, M. 2 G. 2. per Raymond, C. J. at G. Hall.
2 Str. 1087. S. P.

The Indorſee muſt give a reaſonable Notice to the Indorſor in convenient Time, upon Default of Payment by the Drawer; but a Proof of making Enquiry after the Defendant, who could not be found, will be ſufficient to excuſe the giving ſuch Notice, unleſs the Defendant can prove he was to be found.

Action

Action againſt Indorſor of a Note of Hand, the Note was due the fifth, there was no Demand on the Drawer till the eighth, and no Notice to the Indorſor till the nineteenth: Mr. Juſtice *Deniſon* thought the Plaintiff had not made uſe of due Diligence either in Demanding of the Money, or in giving Notice to the Indorſor, and ſaid there were no Days of Grace on a Note as there are on a Bill of Exchange; but the Jury ſaid it was commonly underſtood that there were three Days of Grace, and therefore thought the Demand was made in Time; but the Judge ſaid the Law was otherwiſe, and directed them to find for the Defendant. Dexlaux *and* Hood, 7. Feb. at G. Hall, 1752.

In an Action againſt the Indorſor, Lord *Raymond* would not allow the Defendant to give in Evidence that the Plaintiff deſired him to indorſe the Note, to enable him to bring an Action againſt the Drawer, but declared he would not ſue the Defendant. Collet *and* Griffith, at G. Hall, H. 2 G. 2.

But where the Action was brought by the Drawee againſt Drawer, Defendant was let in to ſhew it was delivered as an Eſcrow, *viz.* As a Reward, in Caſe he procured the Defendant to be reſtored to an Office, which it being proved he did not effect, there was a Verdict for the Defendant. Jefferies *and* Auſtin, M. 12 G. 1. Str. 674. per Eyre, C. J.

And it ſeems a reaſonable Diſtinction which has been taken between an Action between the Parties themſelves, in which Caſe Evidence may be given to impeach the Promiſe, and an Action by or againſt a third Perſon, *viz.* an Indorſee or an Acceptor. Snelling *and* Briggs, at Reading, Lent 1741. per Parker, J.

Boyer *and* Bampton, M. 14 G 2. Str. 1155.

Where the Defendant borrowed Money of *J. S.* who lent it knowingly to game with, and aſſigned the Note for a valuable Conſideration to the Plaintiff, who had no Notice, yet it was held void by 9 *An. c.* 14.

E. 6. G. 2.

Where in the Declaration the Indorſement was ſet out to be for value received, but being produced, had it not: Lord Chief Juſtice *Eyre* allowed the Indorſement to be filled up in Court, notwithſtanding the Caſe of *Clements* and *Jenkins P.* 3 *G.* 2. was cited, where Lord *Raymond* refuſed to let it be done.

Vivian *and* Douglaſs, E. 9 G. 2. per Eyre, C. J. and the Plaintiff nonſuited, Str. 1103.

But a bare Indorſement of a name transfers no property, and though it may be filled up at any Time before the Note is given in Evidence, yet that has been denied after. Yet where the Plaintiff produced the Note with his own Name indorſed, *Lee*, Chief Juſtice ſuffered him to ſtrike it out.

Cited by Mr. Faz. in Rex *and* Morris H. 4. G. 2. Srt. 557.

A Note payable to *B.* or Order, was indorſed thus, "Pray pay the Contents to *C.*" in the Declaration the Indorſement was ſet out as payable to *C.* or Order; at the Trial it was objected there was Variance; But the Court held that, as the Note was in its original Creation indorſable, it would be ſo in the Hands of the Indorſee, though not ſo expreſſed in the Indorſement, and therefore in Subſtance it was agreeable to the Court, and therefore no Variance.

Sir J. Hankey, *v.* Trotman, M. 19. G. 2.

I have already ſaid, if the Indorſee gives Credit to the Drawer, without Notice to the Indorſor, it will diſcharge him; it is therefore to be ſeen what ſhall be conſtrued a giving Credit, and not demanding the Money of the

Drawer

Drawer in a reaſonable Time, is giving Credit. What ſhall be deemed a reaſonable Time muſt be left to the Jury, upon the Circumſtances of the Caſe: However, it may not be improper to ſet down a Caſe or two upon this Head, to ſhew what in general has been deemed a reaſonable Time.

In *Mainwairing* and *Harriſon*, the Caſe was, Upon the ſeventeenth of *September*, being a *Saturday*, about two in the Afternoon, the Defendant gave the Plaintiff a Goldſmith's Note, who paid it away the ſame Day to *J. S.* The Goldſmith paid all that Day and all *Monday*: *J. S.* came on *Tueſday*, but then Payment was ſtopped; upon which, the Plaintiff paid back the Money to *J. S.* and aſked it of Defendant, who refuſed, upon which the Action was brought; the Chief Juſtice left it to the Jury, who would have found it ſpecially, but he would not let them, ſaying, it was a Matter proper for their Determination; upon which, they gave a Verdict for the Defendant, and held there was *Laches* in *J. S.* ſaying, they were all agreed, that two Days was too long. 1 Str. 508.

So where *Chitty* had given the *Eaſt India* Company a Note on *Caſwell*, at eleven in the Morning, they did not ſend it for payment till two o'clock the next Day; and held, that they had made it their own by their Laches. In *Hill* and *Lewis*, the Defendant indorſed to *Z.* who the ſame day indorſed to the Plaintiff, who afterwards, the ſame Day, received Money upon other Bills of the ſame Banker, and might have received the Money upon the M. 16. G. 2. at G. Hall. Str. 1175. Salk. 132.

Bill in Queſtion, if he had demanded it. The Night following the Banker broke, and the Jury, upon Conſideration (it being left to them by the Lord Chief Juſtice) found for the Plaintiff.

Anſon *and* Baily, M. 1748. G. Hall.

The Defendant having a Promiſſory Note, payable to him or Order, two Months after Date, indorſed it to the Plaintiff, who ſent his Servant to the Drawer for the Money, who ſaid, the Defendant had promiſed not to indorſe the Note over without acquainting him; that he had not ſo done, and therefore he was not prepared to pay it, but promiſed Payment in three or four Days; and in like Manner put him off from Time to Time. After three Weeks the Plaintiff wrote to the Defendant (not having ſooner learnt his Directions, though it was proved he ſooner enquired after it, and was told where he might learn it) that *Smith*'s Note was not paid; that he had often promiſed Payment, but alledged, the Defendant promiſed not to make Uſe of it without acquainting him firſt: *Smith* became a Bankrupt; Plaintiff writes a ſecond Letter; Defendant anſwers, that when he comes to Town he will ſet that Matter to rights; upon this Evidence, the Jury gave a Verdict for the Plaintiff, notwithſtanding it appeared *Smith* continued Solvent three Weeks, and paid above a hundred Pounds in the Time.

Sir J. Hankey *and* Trotman, M. 19 G. 2. Goodman *and* Shipway, M. 11 G. 2.

As the Reaſonableneſs of the Time is a proper Conſideration for the Jury, the Court will not interpoſe, by Way of granting a new Trial, unleſs the Jury groſly miſbehave; as

if

if they ſhould find for the Plaintiff, where it appeared in Evidence, that he kept Bankers Bills from *April* to *Auguſt*, before the Banker broke.

The Defendant had a Note of ſixty Pounds of one *Bellamy*, a Goldſmith, payable to him or Bearer, at a Day then to come, about a Week before which, he diſcounted it at the Bank, without indorſing the Bill; *Bellamy* about two Months after broke, without having paid the Bill, upon which the Bank brought *Aſſumpſit* for Money lent, and upon this Evidence obtained a Verdict; but the Court granted a new Trial, holding it to be a Verdict againſt Law; for if the owner of a Bill, payable to Bearer, delivers it for ready Money paid down for the ſame, and not for Money antecedently due, or for Money lent on the ſame Bill, this is Selling of the Bill like Selling of Tallies, *&c.* But if there be an Indorſement thereon, the Indorſee may have Remedy on that Indorſement, provided he demand the Money in a convenient Time.

Bank of England *and* Newman, P. 11. W. 3. Salk. MS.

1 Ld. Raym. 442.

As the Intent of the 3 & 4 *An. c.* 9. was to put Promiſſory Notes upon the ſame Footing with Inland Bills of Exchange; all that has been before ſaid in Regard to Promiſſory Notes, is applicable to ſuch Inland Bills. However, it may be proper further to take Notice, that 9 & 10 *W.* 3. *c.* 17. gives Power of proteſting of any Inland Bill of Exchange of five Pounds or upwards (in which is acknowledged and expreſſed the Value to be received); but this Act has no effect, unleſs

the Party on whom the Bill was drawn accepts it by Under-writing; therefore, by the 3 & 4 *An. c.* 9. the ſame Power is given in Caſe the Party refuſe to accept it, with Proviſo, that no Proteſt ſhall be neceſſary unleſs the Bill be drawn for twenty Pounds and upwards.

Borough *and* Perkins, Salk. 131.

It has been held upon the Statutes, that in declaring upon an Inland Bill a Proteſt need not be ſet forth, as it muſt upon a Foreign Bill, for the Statute does not take away the Plaintiff's Action for want of a Proteſt, but only deprives him of Damages or Intereſt.

6 Mod. 81. S. C.

But if any Damages accrue to the Drawer for want of a Proteſt, they ſhall be born by him to whom the Bill is made, and if in ſuch Caſe the Damage amounts to the Value of the Bill, there ſhall be no Recovery.

1 Show. 317.

It is not neceſſary to ſet forth the Cuſtom in an Action upon a Bill of Exchange, for *Lex Mercatoria eſt Lex terræ*; and if he does ſet it forth, and does not bring his Caſe within it, yet if by the Law Merchant he has Right, the ſetting forth the Cuſtom ſhall be rejected as Surpluſage.

Clark *and* Plgot, Salk, 126.

If *A* writes his Name on the Back of the Bill, and ſends it to *J. S.* to get it accepted, which is done accordingly, *A.* may notwithſtanding bring an Action againſt the Acceptor, for *J. S.* has it in his Power to act either as Servant or Aſſignee; for he may Witneſs his Election by filling up the Blank over the Name to receive it as Indorſee, or by omitting it, act only as Servant.

By

By the Statute of Frauds, ſeveral Things muſt be Evidenced by Writing, of which before parol Evidence had been ſufficient.

1. All Leaſes, Eſtates, Intereſt of Freehold, or Term of Years, created by Parol, and not put in Writing and ſigned by the Parties making the ſame, or their Agents thereunto lawfully authorized by Writing, ſhall have the Effect of Eſtates at Will only, except Leaſes not exceeding three Years from the making, whereupon the Rent reſerved amounts to two thirds of the improved Value, and that no ſuch Eſtate or Intereſt ſhall be granted or ſurrendered but by Deed or Note in Writing.

2. All Declarations and Aſſignments of Truſts ſhall be proved by ſome Writing ſigned by the Party, or by his laſt Will, except Truſts ariſing, transferred or extinguiſhed by Implication of Law.

3. It is enacted, That no Action ſhall be brought whereby to charge any Executor or Adminiſtrator upon any ſpecial Promiſe, to anſwer Damages, out of his own Eſtate; or whereby to charge the Defendant upon any ſpecial Promiſe to anſwer for the Debt, Default, or Miſcarriages, of another Perſon; or to charge any Perſon upon any Agreement made upon Conſideration of Marriage, or upon any Contract or Sale of Lands, Tenements, or Hereditaments, or any Intereſt in or concerning them, or upon any Agreement that is not to be performed within the Space of one Year from the making thereof, unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome Memorandum or Note thereof, ſhall be

be in Writing, ſigned by the Party to be charged therewith, or by ſome other Perſon by him thereunto lawfully authoriſed. And that no Contract for the Sale of Goods, Wares, and Merchandize, for the Price of ten Pounds Sterling or upwards, ſhall be allowed to be good, except the Buyer ſhall accept Part of the Goods ſo ſold, and actually receive the ſame, or give ſomething in Earneſt to bind the Bargain, or in Part of Payment, or that ſome Note or Memorandum in Writing of the ſaid Bargain be made, and ſigned by the Parties to be charged, or their Agents thereunto lawfully authoriſed.

1 Ld. Raym. 450. Upon theſe Clauſes it has been held, that the Plaintiff need not in his Declaration ſhew any Note in Writing, but it will be ſufficient for him to produce it on the Trial; but if ſuch Promiſe is pleaded in Bar of another Action, it muſt be ſhewn to be in Writing, ſo that it may appear to be ſuch a Contract on which an Action will lie.

Towers *and* Sir J Oſborne, Str. 516. Defendant beſpoke a Chariot, and when made, refuſed to take it: In an Action for the Value, *Pratt* held this not a Caſe within the Statute, which relates only to Contracts for the Actual Sale of Goods, where the Buyer is immediately anſwerable without Time given him by ſpecial Agreement, and the Seller is to deliver the Goods immediately.

Cocke *and* Baker, Hil. 3 G. 1. C. B. Mutual Promiſes to marry are not within this Act, though in 3 *Lev.* 65. *Philpot* and *Wallet* they are held to be ſo.

So

So a Promiſe to pay upon the Return of a Ship is not within the Statute, for the Ship by Poſſibility may return in a Year. Salk. 280. Per omnes Juſtic'.

Where the Undertaker only comes in Aid to procure Credit to the Party, there is a Remedy againſt both, and both are anſwerable according to their diſtinct Engagements. But where the whole Credit is given to the Undertaker, ſo that the other Party is only as his Servant, and there is no Remedy againſt him; this is not a collateral Undertaking. Therefore if two come to a Shop, and one buys, and the other, to gain him Credit, promiſes the Seller, "If he does not pay you I will." This is a collateral Undertaking, and void without Writing; but if he ſays, "Let him have "the Goods, I will be your Pay-maſter;" this is an Undertaking for himſelf, and he ſhall be intended the very Buyer, and the other to act as his Servant. But if *A.* promiſes *B.* that if he will cure *D.* of a Wound, he will ſee him paid; it is only a Promiſe to pay if *D.* does not; and therefore ought to be in Writing. However, it is impoſſible to lay down any preciſe Rule for the Conſtruction of ſuch Sort of Words, but it muſt be left to the Jury to determine upon the whole Circumſtances of the Caſe, to whom the Original Credit was given. Berkmyr *and* Darnel, Salk. 27. Watkins *and* Perkins, 1 Raym. 224. Salk. 27. è contra

In Conſideration that the Plaintiff would not ſue *A. B.* the Defendant promiſed to pay the Plaintiff the Money due, *viz.* four Pounds, in a Week; and this was held to be within the Statute of Frauds; for no Conſideration laid that the Plaintiff had promiſed not to ſue, Rothery *and* Curry, Tr. 21 G. 2. C. B.

and

and if he had, *A. B.* could in no Sort have availed himſelf of this Agreement, but the Debt is ſtill ſubſiſting, and conſequently the Promiſe collateral.

Read *and* Naſh, Hil. 23 G. 2.

But where it was in Conſideration that the Plaintiff in an Action of Aſſault and Battery againſt *J. S.* would withdraw the Record, and forbear to proceed, he would pay him thirty Pounds. The Court held this to be a new Conſideration ſufficient to raiſe a Promiſe, and not within the Statute.

Gordon *and* Martin, Tr. G. 2. Fitzg. 302.

So if *A.* Promiſe that *B.* will pay ſuch a Sum, *A.* is the principal Debtor, for the Act done is on his Credit, and not on *B*'s.

Before we conclude with written Evidence, it is proper to take Notice of *7 Jac. c.* 12. which enacts, That the Shop Book of a Tradeſman ſhall not be Evidence after a Year. However, it is not Evidence of itſelf within the Year, without ſome Circumſtances to make it ſo. As if it be proved that the Servant who wrote it is dead, and that it is his Hand-writing, and that he was accuſtomed to make the Entries. So where Evidence was, that the uſual Way of the Plaintiff's Dealings was, that the Drayman came every Night to the Clerk of the Brew-houſe, and gave him an Account of the Beer delivered out, which he ſet down in a Book, to which the Draymen ſet their Hands, and that the Drayman was Dead, and this his Hand; it was held good Evidence of a Delivery. But where the Plaintiff, to prove Delivery, produced a Book which belonged to his Cooper, who was dead, but his Name ſet

Salk. 690.

Salk. 285.

Clerk *and* Bedford, M. 5 G. 2.

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to ſeveral Articles, as Wine delivered to the Defendant, and a Witneſs was ready to prove his Hand; Chief Juſtice *Raymond* would not allow it, ſaying, it differed from Lord *Torrington*'s Caſe, becauſe there the Witneſs ſaw the Drayman ſign the Book every Night.

Upon an Iſſue out of Chancery, to try whether eight Parcels of *Hudſon*'s *Bay* Stock, bought in the Name of Mr. *Lake*, were in Truſt for Sir *Stephen Evans*, his Aſſignees (the Plaintiffs) ſhewed firſt, that there was no Entry in the Books of Mr. *Lake* relating to this Tranſaction. Seeondly, Six of the Receipts were in the Hands of Sir *Stephen Evans*, and there was a Reference on the Back of them by *Jeremy Thomas* (Sir *Stephen*'s Book-keeper) to the Book *B. B.* of Sir *Stephen Evans*. Thirdly, *Jeremy Thomas* was proved to be dead; and upon this, the Queſtion was, whether the Book of Sir *Stephen Evans* referred to, in which was an Entry of the Payment of the Money, ſhould be read. And the Court of King's Bench, at a Trial at Bar, admitted it not only as to the ſix, but likewiſe as to the other two in the Hands of Sir *Biby Lake*, the Son of Mr. *Lake*. And in *Smartle* and *Williams*, where the Queſtion was whether the Mortgage Money was really paid; a Scrivener's Book of Accounts (the Scrivener being dead) was held good Evidence of Payment. 3 May 1738. Cited by Ld. Hardwick, in Montgomorie and Turner, 1751.

If *J. S.* be ſeiſed of the Manors of *A.* and *B.* and he cauſes a Survey to be taken of *B.* and afterwards conveys it to *J. N.* and 1 Ld. Raym. 734.

after

after Diſputes ariſe between the Lords of the two Manors concerning the Boundaries, this Survey may be given in Evidence. *Aliter* if the two Manors had not been in the ſame Hands at the Time of the Survey taken.

To come now to the unwritten Evidence, or Proof *Vivâ Voce*; as to which every Perſon may be a Witneſs, but ſuch who are excluded for want of Integrity or Diſcernment.

In Regard to want of Integrity, it is a general Rule, that no Perſon intereſted in the Queſtion can be a Witneſs.

Per Hardwick, C. J. in Rex *v.* Bray, H. 10. G. 2.

The ſtrict Notion of the Objection to the Competency of a Witneſs is upon a *Voyer dire*, whether he is to get or loſe by the Event of the Cauſe; yet it is certain that the repelling a Witneſs is not confined to an immediate Intereſt, for if he is called to a Matter, where he claims under the ſame Title, though he is not affected in that Action, yet he ſhall not be admitted; and that is the Caſe of Commoners. So in an Action on a Policy of Inſurance, any who have inſured upon the ſame Ship cannot be Witneſſes. Yet in an Action by a Maſter for Beating his Servant *per quod Servitium amiſit*, the Servant may be a Witneſs, for he is not only not intereſted in the Cauſe, but not in the Queſtion: For the Queſtion there is the Loſs of Service, and the Action he is intitled to is of a different Kind.

Per Lee, Ch. J. in Eaſt India Comp. *and* Goſling, M. 16 G. 2.

Ridout *and* Johnſon, Paſc. 11 An.

Jewel *and* Harding, Tr. 10 G. 1.

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It muſt be an apparent Intereſt, for a future contingent Intereſt will not be ſufficient to prevent him from being a Witneſs; therefore an Heir at Law may be a Witneſs, but a Remainder Man cannot.

An Intereſt is when there is a certain Benefit or Advantage to the Witneſs attending the Conſequence of the Cauſe one Way. And therefore, in the firſt Place, a naked Truſt does not exclude a Man from being a Witneſs; therefore ſuch a Truſtee has in Chancery been admitted to prove the Execution of a Deed to himſelf. However, a Truſtee ſhall not be a Witneſs to betray the Truſt; therefore where the Defendant pleaded to Debt on Bond, the 5 & 6 *Ed.* 6. againſt Buying and Selling Offices, and upon the Trial *A.* was produced as a Witneſs, to give an Account upon what Occaſion the Bond was given, Lord Chief Juſtice *Holt* refuſed to admit him, becauſe it appeared he was privately intruſted to make the Bargain by both Parties, and to keep it ſecret. 1 P. W. 239.

And the Caſe is the ſame as to Counſel and Attornies, who ought not to be permitted to diſcover the Secrets of their Clients, though they offer themſelves for that Purpoſe; for it is the Privilege of the Client, and not of the Counſel or Attorney; and it is contrary to the Policy of the Law to permit any Perſon to betray a Secret which the Law has intruſted him with; and it is the Miſtaking it for the Privilege of the Witneſs that has ſometimes led Judges into the Suffering ſuch a Witneſs to be examined. But to this there

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are ſome Exceptions: Firſt, As to what ſuch Perſons knew before the Retainer; for as to ſuch Matters they are clearly in the ſame Situation as any other Perſon: Secondly, To a Fact of his own Knowledge, and of which he might have had Knowledge, without being Counſel or Attorney in the Cauſe. As ſuppoſe him Witneſs to a Deed produced in the Cauſe, he ſhall be examined to the true Time of Execution. So if the Queſtion was about a Raſure in a Deed or Will, he might be examined to the Queſtion, whether he had ever ſeen ſuch Deed or Will in other Plight, for that is a Fact of his own Knowledge; but he ought not to be permitted to diſcover any Confeſſions his Client may have made to him on ſuch Head: So if an Attorney was preſent when his Client was ſworn to an Anſwer in Chancery, upon an Indictment for Perjury, he would be a Witneſs to prove the Fact of taking the Oath, for it is a Fact in his own Knowledge, and no Matter of Secrecy committed to him by his Client.

Lord Say and Seal's Caſe, M. 10. An.

Per Sir Or. Bridgman, with Advice of all the Judges.

Str. 1122. E con.

1 Mod. 21. A *Scire facias* was brought by the King to avoid a Patent, and Exception was taken to the Witneſs becauſe he was Deputy to the Perſons that would avoid it, and the Exception was diſallowed, becauſe the *Scire facias* is in the King's Name, and therefore it cannot be preſumed that the Intereſt is in another, which would deſtroy the very Being of the *Scire facias*, but the Proof of that ought to come on the Defendant's Side, to deſtroy the Proceedings.

It

It is no good Exception to a Witneſs, that he has common *pur Cauſe de Vicinage* of the Lands in Queſtion, for this is no Intereſt, but only an Excuſe for a Treſpaſs.

From this Rule it is apparent; Firſt, That the Plaintiff or Defendant cannot regularly be a Witneſs in his own Cauſe, for they are moſt immediately intereſted; therefore an Anſwer in Equity is of very little Weight where there are no Proofs in the Cauſe to back it: yet if there be but one Witneſs againſt a Defendant's Anſwer, the Court will direct a Trial at Law to try the Credibility of the Witneſs; and in ſuch Caſe will order the Defendant's Anſwer to be read to the Jury. Eq. Caſes Abr. 229.

But if any Perſon be arbitrarily made a Defendant to prevent his Teſtimony, the Plaintiff ſhall not prevail by that Artifice; but the Defendant, againſt whom nothing is proved, ſhall be ſworn notwithſtanding, for he does not ſwear in his own Juſtification, but in Juſtification of another. However, this Rule is to be underſtood, where there is no Manner of Evidence againſt the Defendant, for if there be, his Guilt or Innocence muſt wait the Event of the Verdict.

In Treſpaſs, if one whom the Plaintiff deſigned to make Uſe of as a Witneſs, be by Miſtake made a Defendant, the Court will on Motion give leave to omit him, and have his Name ſtruck out of the Record, even after Iſſue joined; for the Plaintiff can in no Caſe examine a Defendant, though nothing is proved againſt him: And therefore, in an Information for a Miſdemeanour, the Attor- 1 Sid. 441.

ney General (*Trevor*) offering to examine a Defendant for the King, which the Court would not permit, he entered a *Nolle Proſequi*, and then examined him.—If a material Witneſs for the Defendant in Ejectment, be alſo made a Defendant, the right Way is for him to let Judgment go by Default; but if he pleads, and by that Means admits himſelf to be Tenant in Poſſeſſion, the Court will not afterwards, upon Motion, ſtrike out his Name. But in ſuch Caſe, if he conſents to let a Verdict be given againſt him, for as much as he is proved to be in Poſſeſſion of, I ſee no Reaſon why he ſhould not be a Witneſs for another Defendant.—In Treſpaſs, the Defendant pleaded *Quod Actio non, quia dicit*, that *Richard Mawſon*, named in the *Simul cum*, paid the Plaintiff a Guinea in Satisfaction, and Iſſue thereon; the Defendant produced *Mawſon*; and per *Eyre*, C. J. He may be examined, for what he is now to prove cannot be given in Evidence in another Action, and in Effect he makes himſelf liable by ſwearing he was concerned in the Treſpaſs.

Dormer *and* Forteſcue.

Poplet *v.* James, Tr. 5 G. 2.

From what has been ſaid it appears, 1. That a *Particeps Criminis* may be Witneſs for the Plaintiff, though left out of the Declaration for that Purpoſe; yet this mightily leſſens his Credit, eſpecially in Treſpaſſes, where Satisfaction from one is a Diſcharge for all the reſt. In a criminal Proſecution, according to the Opinion of ſome, he can only be a Witneſs in two Caſes, *viz.* If he is actually pardoned; or if he has no Promiſe of a Pardon. But others have held, that ſuch a Promiſe will be

Keb. 17, 18.

no

no Exception to his Competency, but only to his Credit; therefore in *Layer*'s Trial the Court refuſed to let a Witneſs be examined on a *Voyer dire*, whether he had ſuch a Promiſe.

2. That Huſband and Wife cannot be admitted to be Witneſs for each other, becauſe their Intereſt are abſolutely the ſame; nor againſt each other, becauſe contrary to the legal Policy of Marriage. However, there are ſome Exceptions to this Rule: Firſt, In the Caſe of High Treaſon it has been ſaid, a Wife ſhall be admitted as a Witneſs againſt her Huſband, becauſe the Tye of Allegiance is more obligatory than any other. Secondly, By the 5 *G.* 2. the Wife of a Bankrupt may be examined by the Commiſſioners touching his Eſtate, but not his Bankruptcy. Thirdly, If a Woman be taken away by Force and married, ſhe may be an Evidence againſt her Huſband indicted on 3 *H.* 7. 2. againſt the Stealing of Women: For a Contract obtained by Force has no Obligation in Law. So upon an Indictment on 1 *Jac.* 1. *c.* 11. for marrying a ſecond Wife, the firſt being alive, though the firſt cannot be a Witneſs, yet the ſecond may, the ſecond Marriage being void: And whether a Wife *de Jure* may not be a Witneſs againſt her Huſband on an Indictment for a perſonal Tort done to herſelf, ſeems to be Matter of Doubt. In Lord *Audley*'s Caſe, ſhe was allowed to be a Witneſs to prove her Huſband aſſiſted to a Rape upon her; and though this Caſe has been denied to be Law, yet it was in Caſes where the Indictment was

not for a perſonal Tort to the Wife; and in the Caſe of *Aayre*, on an Indictment for the Battery of the Wife, Lord *Raymond* ſuffered the Wife to give Evidence; and the Wife is always permitted to ſwear the Peace againſt her Huſband; and I have known her Affidavit admitted to be read on an Application to the Court of King's Bench for an Information againſt the Huſband for an Attempt to take her away by Force after Articles of Separation; and it would be ſtrange to permit her to be a Witneſs to ground a Proſecution upon, and not afterwards be a Witneſs at the Trial. Fourthly, In an Action between other Parties, the Wife may be a Witneſs to charge her Huſband, *ex. gr.* to prove the Goods for which the Action is brought, ſold on the
Str. 504. Credit of the Huſband.—So perhaps, in ſome Caſes, in an Action againſt her Huſband, tho' ſhe will not be admitted to be a Witneſs, yet a Confeſſion of hers may be given in Evi-
Ibid. 527. dence to charge him. As where an Action was brought for Nurſing his Child, the Plaintiff was allowed to give in Evidence, that the Wife declared the Agreement to have been for ſo much *per* Week, becauſe ſuch Matters are uſually tranſacted by the Women.

But no other Relation is excluded, becauſe no other Relation is abſolutely the ſame in Intereſt; Therefore in *Pendrei* and *Pendrel*, before Lord *Raymond*, which was an Iſſue out of Chancery, to try whether the Plaintiff was Heir to *T. P.* the Marriage and Birth being admitted by Order, the Mother was admitted to prove the Father had acceſs to her. So

in

in *Lomax* and *Lomax*, before Lord *Hardwicke*, the Mother was admitted to prove the Marriage; and in Ejectment againſt *Sarah Brodie*, at *Hereford* 1744, Mr. J. *Wright* admitted the Father to prove the Daughter legitimate.

To conſider now the Exceptions to this Rule:

1. Exception; A Party intereſted will be admitted in a criminal Proſecution in moſt Inſtances.

H. Had a promiſe of a Note of five Pounds from his Mother-in-law, and, by ſome Slight, got her Hand to a Note for a hundred Pounds, and held by *Holt* at *Guildhall*, that the Mother could not be a Witneſs in an Information for the Cheat; for though the Verdict cannot be given in Evidence in an Action upon the Note, yet he ſaid they were ſure to hear of it to influence the Jury: But in *The King* and *Bray* Lord *Hardwicke* ſaid, If this Caſe had not been ſettled by ſo great a Judge, it would go to the Credit only, and not to the Competency, and in *Far.* 119. it is ſaid by *Holt*, That if a Woman give a Note or Bond to a Man, to procure her the Love of *J. S.* by ſome Spell or Charm, in an Indictment for the Cheat, ſhe ſhall be a Witneſs, though it tends to avoid the Note, for the Nature of the Thing allows no other Evidence. So if the doing the Act, which he is now Evidence to invalidate or ſet aſide, was a Means to obtain his Liberty, he ſhall be a Witneſs, as in the Caſe of a Bond given by Dureſs. The Defendant was indicted for

Salk. 283.

Salk. 286. S. P.

Far. 119.

tearing a Note, whereby he promiſed to pay ſo much Money to *A. B.* who was produced as a Witneſs, and, notwithſtanding it was objected, that he was going to ſwear to ſet up his own Demand, becauſe, if convicted, the Court would compel the Defendant to give a new Note, yet he was admitted.

Str. 595.

Rev. *v.* Nunes, P. 9 G. 2.

Mrs. *L.* gave a Promiſſory negotiable Note to the Defendant in Truſt to aſſign it to Mrs. *T.* who was indebted to Mrs. *L.* the Defendant broke his Truſt and negotiated the Note; Mrs. *L.* having paid the Note, brought a Bill in Chancery againſt the Defendant, who, in his Anſwer denied the Truſt, upon which he was indicted for Perjury, and Lord *Hardwicke* refuſed to admit Mrs. *L.* to give Evidence of the Truſt, and compared it to the Caſe of Forgery, where the Perſon whoſe Hand is forged is not admitted, and ſaid it differed from the Caſe of Uſury, where the Party is admitted to be an Evidence if the Money is paid; the Reaſon of which is, being Party to the Crime, he will not be permitted to have any Remedy for it again.

Though, as is ſaid, a Perſon whoſe Hand is forged, is not admitted to prove the Forgery, yet, under many Circumſtances he may, where he is not directly intereſted in the Queſtion; as in *Wells*'s Caſe, who was indicted for forging a Receipt from a Mercer at *Oxford*, the Mercer having before recovered the Money in an Action againſt *Wells*, was admitted to prove the Forgery.

Per Willes Ch. J at Oxon.

So in an Indictment for Perjury on the Statute, the Perſon injured cannot be a Witneſs,

neſs, becauſe the Statute gives him ten Pounds, but in an Indictment at Common Law, the Party injured may be a Witneſs.

2. Exception; A Party intereſted will be admitted for the Sake of Trade and the common Uſage of Buſineſs.

Therefore a Porter ſhall be Evidence to prove a Delivery of Goods: So a Banker's Apprentice to prove the Receipt of Money: So an Indorſement on a Bond of the Receipt of Intereſt by Obligee has been admitted to bring it within the twenty Years.

3. Exception; A Party intereſted will be admitted, where no other Evidence is reaſonably to be expected.

As upon the Statute of Hue and Cry, where the Party robbed is admitted, even though he is himſelf Plaintiff.

So in Actions by Informers for ſelling Coals without meaſuring by the Buſhel, the Servants are Witneſſes for their Maſter, notwithſtanding 3 *G.* 2. which inflicts a Penalty upon them for not doing it, though *Eyre* Chief Juſtice did, on that Account, in two or three Inſtances, refuſe to receive them. Per Lee, C. J. in East India Company *and* Goſling. Palfrey *v.* Sejour. M. 6 G 2. Cowel *v.* Hough, P. 7 G. 2.

So where the Queſtion was whether the Defendants had a Right to be Freemen, though it appeared there were Commons belonging to the Freemen, yet an Alderman was admitted to prove them no Freemen, it appearing that none but Aldermen were privy to the Tranſactions of the Corporation with Regard to making Perſons free. Rex *v.* Phipps *and* Archer, at Cambridge, per Lee, C. J.

So where the Queſtion was, whether the Maſter had deſerted the Ship (*Suſſex*) without East India Company *v.* Goſling. 16 G. 2.

ſufficient Neceſſity, a Sailor, who had given Bond to the Maſter (as a Truſtee for the Company) not to deſert the Ship during the Voyage, was admitted Evidence for the Maſter, it appearing all the Sailors entered into ſuch Bonds.

Per Holt, C J. Salk. 289.

So where a Son having a general Authority to receive Money for his Father, received a Sum, and gave it to the Defendant; the Son was admitted as a good Witneſs (his Teſtimony being corroborated by other Circumſtances) for his Father in an Action of Trover for the Money.

Mich. 1752, at Weſtminſter.

So in Trover againſt a Pawnbroker, the Servant imbezling his Maſter's Goods, and pawning them, will be admitted to prove the Fact.

4. Exception; a Party intereſted will be admitted, where he acquires the Intereſt by his own Act after the Party, who calls him as a Witneſs, has a Right to his Evidence.

Skin. 586.

And therefore though one, who lays a Wager at the Time of the original Wager, is no Witneſs, yet one who lays a Wager afterwards ought to be admitted; and perhaps a Perſon, who laid a Wager at the ſame Time, will be admitted, in caſe he has received the Money without any Condition to return it, for the Money will be intended to be duly paid.

Reſcous v. Williams, 3 Lev. 132, on Demurrer to Evidence.

5. Exception; a Party intereſted will be admitted where the Poſſibility of Intereſt is very remote.

As

As where an Information in Nature of a *Quo Warranto* was brought again the Mayor, Citizens, and Commonalty of *London*, for taking two-pence *per* Chaldron for all Sea Coals brought to *London*; Freemen were admitted to prove the Preſcription, it appearing that the Mayor and Sheriffs have the whole Profits of this Toll, though they have it for the Benefit of the Corporation, of which all the Freemen are Members; yet theſe having no particular Profit to themſelves, were ſwore as Witneſſes; for it cannot be preſumed that, for an Advantage ſo ſmall and ſo remote, they would be partial and perjure themſelves. And *Scrogg*'s Chief Juſtice ſaid, that it ought not to be a general Rule, that Members of Corporations ſhall be admitted or denied to be Witneſſes in Actions for or againſt their Corporations; but every Caſe ſtands upon its own particular Circumſtances, *viz.* Whether the Intereſt be ſo conſiderable as by Preſumption to produce Partiality or not. And this Exception has of late Years been a good deal extended. In *The King* and *Bray*, *Hill* 10. *G.* 2. Lord Chief Juſtice *Hardwick* ſaid, that unleſs the Objection appeared to him to carry a ſtrong Danger of Perjury, and ſome apparent Advantage might accrue to the Witneſs, he was always inclined to let it go to his Credit only, in order to let in a proper Light to the Caſe, which would otherwiſe be ſhut out; and, in a doubtful Caſe, he ſaid it was generally his Cuſtom to admit the Evidence, and give ſuch Directions to the Jury as the Nature of the Caſe might require: That was an Information

2 Lev. 231. tamen Quære whether this Caſe is Law.

formation in Nature of *Quo Warranto*, for the Defendant to ſhew by what Authority he claimed to be Mayor of *Tintagel*, and Iſſue taken upon this Cuſtom, *viz.* That at a Court Leet annually held on the tenth of *October*, the Mayor for the Year enſuing is to be choſen, and, for that Purpoſe, two Elizors are to be nominated, one by the Mayor, the other by the Town-Clerk; theſe Elizors are to nominate twelve Jurymen, who are to preſent the Mayor for the Year enſuing; and in caſe the Town-Clerk refuſes to nominate his Elizor, that then the Mayor ſhall nominate the ſecond Elizor. At the Trial *P. Hoſkins*, who was ſecond Elizor, nominated by the Mayor upon the Default of the Town Clerk's Nomination at the Election of the Defendant, and *P. Hoſkins*, who ſerved as Juryman at the ſaid Election, were both offered as Witneſſes to prove the Cuſtom, but rejected *in toto*, as not competent Witneſſes to any Part of it: But, upon Motion, a new Trial was granted; the Chief Juſtice ſaid, the having an Elizor is intended a Franchiſe in the Borough, but in the Elizor himſelf it is only an Authority, and the Execution of it paſt and over. And he ſaid, he knew no Caſe where a Man who has acted under a bare Authority, has been refuſed to prove the Execution of it. Perſons that have been themſelves in Office are often called to ſhew what the Uſage is, and what they did when in Office, and yet if their Acts are illegal, they are liable to *Quo Warranto*, and he ſaid the Caſe in 3 *Keb.* 90. was very material; for there, upon an Iſſue to try whether

whether by the Cuſtom of the Manor the Tenants were to pay Fines, and be re-admitted upon the Death of the laſt admitting Lord, the Steward was admitted to prove the Cuſtom, though he had Fees upon Admiſſion.

The ſecond Sort of Perſons excluded from Teſtimony are ſuch as are ſtigmatized.

Now there are ſeveral Crimes, that ſo blemiſh the Reputation, that the Party is ever after unfit to be a Witneſs; as Treaſon, Felony, and every *Crimen falſi*, as Perjury, Forgery, and the like: For where a Man is convicted of thoſe glaring Crimes againſt the common Principles of Humanity and Honeſty, his Oath is of no Weight. Co. Litt. 6. 2 Stra. 1148.

The common Puniſhment that Marks the *Crimen falſi* is being ſet in the Pillory, and therefore, anciently, they held that no Man legally ſet in the Pillory could be a Witneſs: But the Rigor of this Piece of Law is reduced to Reaſon; for now it is held, that unleſs a Man be put in the Pillory *pro Crimine falſi*, as for Perjury, or Forgery, or the like, it is no Blemiſh to a Man's Atteſtation: It is the Crime and not the Puniſhment that makes the Man infamous; therefore a Perſon convict of Petit Larceny is equally infamous with one Convict of Grand Larceny, for they are both Felony. Co. Litt. 6. 5 Mod. 15. 74. 2 Salk. 689. Ld. Raym. 39. Mackinder's Caſe, C. B. Hil. 27. G. 2.

After a general Statute Pardon, a Perſon attainted is a good Witneſs, and ſo it is after Burning in the Hand, which amounts to a Statute Pardon. Raym. 370, 380. 1 Vent. 349.

If

Hob. 88. Raym. 379. 1 Vent. 349. 1 Sid. 222. 2 Hawk. P.C. 432, 433.

If one found guilty on an Indictment for Perjury at Common Law, is pardoned by the King, he will be a good Witneſs, becauſe the King has Power to take off every Part of the Puniſhment; but if a Man be indicted of Perjury on the Statute, the King cannot Pardon, for the King is diveſted of that Prerogative by the expreſs Words of the Statute.

The Party who would take Advantage of this Exception to a Witneſs, muſt have a Copy of the Record of Conviction ready to produce in Court.

Co. Litt. 6. 2 Hawk. P.C. 434. 2 H. H. P. C. 279.

Thirdly; Infidels cannot be Witneſſes, *i. e.* ſuch who profeſs no Religion, that can bind their Conſciences to ſpeak Truth: But when any Perſon profeſſes a Religion, that will be a Tye upon him, he ſhall be admitted as a Witneſs, and ſworn according to the Ceremonies of his own Religion, for it would be ridiculous to ſwear a Witneſs upon the Holy Evangeliſts, who did not believe thoſe Writings to be ſacred. Thus *Jews* are always ſworn upon the Old Teſtament; *Mahometans* on the Koran; thoſe of the *Gentou* Religion, according to the Ceremonies of that Religion, *&c.*

Fourthly; Perſons excommunicated cannot be Witneſſes, becauſe being excluded out of the Church, they are ſuppoſed not to be under the Influence of any Religion.

2 Bulſt. 154.

Fifthly; The ſame Law, it is ſaid, holds Place in Relation to Popiſh Recuſants. This Opinion is founded on the Statute of 3 *Jac.* I. *c.* 5. which enacts, That every Popiſh Recuſant

ſant Convict ſhall ſtand, to all Intents and Purpoſes, diſabled, as a Perſon lawfully excommunicated: But Mr. Serjeant *Hawkins*, in his Pleas of the Crown, Volume the 1ſt, fol. 23, 24. has very ſenſibly ſaid, that this Conſtruction is over ſevere, as the Purport of the Statute is ſatisfied by the Diſability to bring any Action.

But Perſons outlawed may be Witneſſes, becauſe they are puniſhed in their Properties, and not in the Loſs of their Reputation, and the Outlawry has no Manner of Influence on their Credibility. Co. Lit. 6.

As to thoſe who are excluded from Teſtimony for Want of Skill and Diſcernment, they are Ideots, Madmen and Children.

In Regard to Children, there ſeems to be no preciſe Time fixed, wherein they are excluded from giving Evidence; but it will depend in a great Meaſure on the Senſe and Underſtanding of the Child, as it ſhall appear on Examination to the Court. However, it ſeems to be ſettled, that a Child under the Age of ten ſhall in no Caſe be admitted; but after that Age, if the Child appears to have any Notion of the Obligation of an Oath, after there has been a Foundation laid by other Witneſſes to induce a Suſpicion, the Child ſhall be admitted to prove the Fact: Doubtleſs the Court would more readily admit ſuch a Child in the Caſe of a perſonal Injury (ſuch as Rape) than on a Queſtion between other Parties; and perhaps, in ſuch Caſe, would even admit the Infant to be examined without Oath; for certainly there is much more Reaſon for 1 H. H. P. C. 278. Co. Litt. 6. Steward's Caſe, Old Baily 1704. Str. 700. 1 H. H. P. C. 634. Dy. 304.

for the Court to hear the Relation of the Child, than to receive it at Second-hand from thoſe that heard it ſay ſo. In Caſes of foul Facts done in Secret, where the Child is the Party injured, the repelling their Evidence intirely is, in ſome Meaſure, denying them the Protection of the Law; yet the Levity and Want of Experience in Children is undoubtedly a Circumſtance which goes greatly to their Credit.

I have, in the Courſe of the foregoing Survey, neceſſarily taken Notice of ſome of the more general Rules; but for better Underſtanding the true Theory of Evidence, it will be proper to take a View of them altogether.

The firſt general Rule is, That you muſt give the beſt Evidence that the Nature of the Thing is capable of. Therefore the Copy will not be Evidence where the Original can be had. But, the true Meaning of this Rule is, that no ſuch Evidence ſhall be brought, that *ex naturâ Rei* ſuppoſes ſtill a greater Evidence behind in the Parties Poſſeſſion or Power; therefore, if in the foregoing Caſe the Perſon prove the original Deed in the Hands of the adverſe Party, or to be deſtroyed, a Counterpart or a Copy will be admitted.

The ſecond general Rule is, That no Perſon intereſted in the Queſtion can be a Witneſs: There is no Rule in more general Uſe, and none that is ſo little underſtood; I have therefore endeavoured in the foregoing Part to explain it, and to ſet down the

the ſeveral Exceptions to it, and I can add nothing to what I have already ſaid upon the Subject.

The third general Rule is, That Hearſay is no Evidence, for no Evidence is to be admitted but what is upon Oath; and if the firſt Speech was without Oath, another Oath that there was ſuch Speech, makes it no more than a bare Speaking, and ſo of no Value in a Court of Juſtice. Beſide, if the Witneſs is living, what he has been heard to ſay is not the beſt Evidence. But though Hearſay be not to be allowed as direct Evidence, yet it may in Corroboration of a Witneſs's Teſtimony, to ſhew that he affirmed the ſame Thing before on other Occaſions, and that he is ſtill conſtant to himſelf. 1 Mod. 283.

So where the Iſſue is on the Legitimacy of the Plaintiff or Defendant, it ſeems the Practice to admit Evidence of what the Parents have been heard to ſay, either as to their being or not being married, and with Reaſon, for the Preſumption ariſing from the Cohabitation is either ſtrengthened or deſtroyed by ſuch Declarations, which are not to be given in Evidence directly, but may be aſſigned by the Witneſs as a Reaſon for his Belief one Way or other. But in *Pendrel* and *Pendrel, Hil.* 5. *G.* 2. Lord *Raymond* would not ſuffer the Wife's Declarations, that ſhe ſhould not know her Huſband by Sight, *&c.* to be given in Evidence till after ſhe had been produced on the other Side. So Hearſay is good Evidence to prove, who is my Grandfather, when he married, what Children he had, Grimwade *and* Stephens, Kent 1697.

had, &c. of which it is not reaſonable to preſume I have better Evidence. So to prove my Father, Mother, Couſin, or other Relation beyond the Sea, is dead, and the common Reputation and Belief of it in the Family gives Credit to ſuch Evidence; and for a Stranger it would be good Evidence if a Perſon ſwore that a Brother or other near Relation had told him ſo, which Relation is dead. In Ejectment between the Duke of *Athol* and Lord *Aſhburnham*, *E.* 14. *G.* 2. Mr. *Sharpe*, who was Attorney in the Cauſe, was admitted to prove, what Mr. *Worthington* told him he knew and had heard in regard to the Pedigree of the Family, Mr. *Worthington* happening to die before the Trial. So in Queſtions of Preſcription, it is allowable to give hearſay Evidence in order to prove general Reputation; and where the Iſſue was of a Right to a Way over the Plaintiff's Cloſe, the Defendants were admitted to give Evidence of a Converſation between Perſons not intereſted, then dead, wherein the Right to the Way was agreed. In Ejectment the Plaintiff derived his Title from Lord *R.* in whom he laid a Preſentation of one *Knight*; the Biſhop ſet up a Title in himſelf, and traverſed the Seiſin of Lord *R.* The Plaintiff gave in Evidence an Entry in the Regiſter of the Dioceſe of the Inſtitution of *Knight*, in which there was a Blank in the Place, where the Patron's Name is uſually inſerted, upon which he offered parol Evidence of the general Reputation of the Country, that *Knight* was in by the Preſentation of Lord *R.* Upon a

Skinner *v.* Ld. Bellamont, at Worceſter, 1744.

Biſhop of Meath *v.* Lord Belfield 1747.

Bill

Bill of Exceptions, this came on Error into *K. B.* where the better Opinion was, that the Evidence was allowable; the Regiſter which was the proper Evidence being ſilent. A Preſentation may be by Parol, and what commences by Parol, may be tranſmitted to Poſterity by Parol, and that creates a general Reputation.

The fourth general Rule is, That in all Caſes where general Character or Behaviour is put in Iſſue, Evidence of particular Facts may be admitted: But not where it comes in collaterally. This has ſometimes occaſioned a Queſtion in Chancery, whether it was in Iſſue or not. As where a Bill was brought by a Kept-Miſtreſs for an Annuity; the Defendant in his Anſwer ſaid, "She was "a lewd Woman of infamous Character be-"fore Mr. *P.* became acquainted with her;" and held to be ſufficiently putting her Character in Iſſue, to enable the Defendant to prove particular Facts. But where upon a Bill brought by a Wife, the Huſband in his Anſwer ſaid, "She had not behaved herſelf "with Duty and Tenderneſs to him, as be-"came a virtuous Woman, much leſs his "Wife;" this was held not to put Adultery in Iſſue, ſo as to enable the Huſband to prove particular Facts. In an Action for criminal Converſation, the Defendant may give in Evidence particular Facts of the Wife's Adultery with others, or having a Baſtard before Marriage; becauſe by bringing the Action, the Huſband puts her general Behaviour in Iſſue: And as he may examine to particular Facts, *a fortiori*

Clerk *and* Periam, 27 July 1742.

Lord Doneraile *v* Lady Doneraile, in Dom. Proc. 1734.

Roberts *and* Malſton. per Willes Ch. J. at Hereford 1745.

he may call Witneſſes to her general Character. So in Caſes where the Defendant's Character is put in Iſſue by the Proſecution, the Proſecutor may examine to particular Facts, for it is impoſſible without it to prove the Charge. Yet there is one Caſe of that Sort in which the Proſecutor is not allowed to examine to any particular Fact, without giving previous Notice of it to the Defendant; and that is, where a Man is indicted for being a common Barretor; and the Reaſon is, ſuch Indictments are commonly againſt Attornies, whoſe Profeſſion it is to follow Law Suits; and it is a difficult Matter to draw the Line between that and Acting as a Barretor; therefore it makes it neceſſary for him to know what particular Facts are to be given in Evidence, that he may be prepared to ſhew, that he was fairly employed in thoſe Caſes, and acted in his Profeſſion. But in other criminal Caſes, where the Defendant's Character is not put in Iſſue, the Proſecutor cannot enter into the Defendant's Character, unleſs the Defendant enables him ſo to do, by calling Witneſſes in Support of his Character, and even then the Proſecutor cannot examine to particular Facts, becauſe the general Character of the Defendant was not put in Iſſue, but comes in collaterally. For the ſame Reaſon, if you would impeach the Credit of a Witneſs, you can only examine to his general Character, and not to particular Facts; every Man is ſuppoſed to be capable of ſupporting the one, but it is not likely he ſhould be prepared to anſwer the other without

out Notice; and unleſs his general Character and Behaviour is in Iſſue, he has no Notice.

The fifth general Rule is, *Ambiguitas Verborum latens Verificatione ſuppletur, nam quod ex Facto oritur ambiguum Verificatione facti tollitur.* Therefore where the Teſtatrix deviſed her Eſtate to her Coſin *John Cheere*, there being both Father and Son of that Name, parol Evidence was admitted to prove that the Son was the Perſon meant; for the Heir's Objection aroſe from parol Evidence, and therefore parol Evidence ought to be admitted to anſwer it. So if a Man, having two Manors called *Dale*, levies a Fine of the Manor of *Dale*, Circumſtances may be given in Evidence to prove which Manor he intended, for this is not to contradict the Record, but to ſupport it. Lord *Bacon* in his Reading upon this Maxim diſtinguiſhes Ambiguity into *patens* and *latens*, and ſaith that *latens*, is that which ſeems certain and without Ambiguity, for any Thing that appears upon the Deed or Inſtrument; but there is ſome collateral Matter out of the Deed, that breeds the Ambiguity; but *Ambiguitas patens*, *i. e.* that which appears to be ambiguous upon the Deed or Inſtrument, is never holpen by Averment; for that were in Effect to make that paſs without Deed, which the Law appoints ſhall not paſs but by Deed; therefore, where the Deviſee's Name is totally omitted, parol Evidence cannot be admitted to ſhew who was meant; and as parol Evidence will not be admitted to explain an Ambiguity which

Jones *and* Newman, Tr. 24. G. 2. Cheney's Caſe, 5 Co. S. P.

2 R. A. 676.

Maxim 23.

Ballis *and* Church *v.* Attorney General, 29 Jan. 1741, per Hardwick, Canc.

which is patent, much leſs will it be admitted to alter the apparent Meaning of the Will: Therefore, when a Man gave two thouſand Pounds to his Brother *John*, and in Caſe of his Death, to his Wife, Lord Chief Juſtice *Lee* would not ſuffer Proof to be given that the Teſtator meant his Brother ſhould have it only during Life. But where *A* deviſed four hundred Pounds to his Wife, and made her Executrix, without diſpoſing of the Surplus; Lord Chancellor admitted parol Evidence to ſhew the Teſtator meant his Wife ſhould have it, for there was no Ambiguity in the Will, nor was it to alter the apparent Intent of the Teſtator, for by Law ſhe was intitled to the Surplus as Executrix, therefore the Evidence was admitted only to rebut the Equity. But, in *Brown* and *Selwin*, in *Dom. Proc.* 1734, the Teſtator having expreſly deviſed the Reſidue of his perſonal Eſtate to his Executors, one of whom owed him Money upon Bond, parol Evidence was refuſed to be admitted, to prove the Teſtator meant to extinguiſh the Bond Debt, by making the Obligor Executor; for that would have been to have altered the apparent Intent, and not ſimply to have rebutted an Equity.

Lowfield *and* Stoneham, Decem. 1746, at G. Hall.

Lake *and* Lake, 8 Nov. 1751.

The ſixth general Rule is, In every Iſſue the Affirmative is to be proved. A Negative cannot regularly be proved, and therefore it is ſufficient to deny what is affirmed until it be proved, but when the Affirmative is proved, the other Side may conteſt it with oppoſite Proofs; for this is not properly the Proof of a Negative, but the Proof of ſome

Pro-

Propoſition totally inconſiſtent with what is affirmed; as if the Defendant be charged with a Treſpaſs, he need only make a general Denial of the Fact, and if the Fact be proved, then he may prove a Propoſition inconſiſtent with the Charge, as that he was at another Place at the Time, or the like.

But to this Rule there is an Exception of ſuch Caſes, where the Law preſumes the Affirmative contained in the Iſſue. Therefore, in an Information againſt Lord *Halifax* for refuſing to deliver up the Rolls of the Auditor of the Exchequer; the Court of Exchequer put the Plaintiff upon proving the Negative, *viz.* That he did not deliver them; for a Perſon ſhall be preſumed duly to execute his Office till the contrary appear.

The ſeventh general Rule is, That no Evidence need be given of what is agreed by the Pleadings. For the Jury are only ſworn to try the Matter in Iſſue between the Parties, ſo that nothing elſe is properly before them. In Replevin, the Defendant avowed taking the Cattle Damage feaſant *in Loco in quo* as Parcel of his Manor of *K.* the Plaintiff replied, that it was Parcel of the Manor of *K.* and made Title to it, and traverſed that the Manor of K. was the Freehold of the Defendant; He was not permitted to prove that *K.* was no Manor, for that is admitted by the Traverſe. Dy. 183. 9, 58.

The Jury cannot find any Thing againſt that which the Parties have affirmed and admitted of Record, though the Truth be contrary; but, in other Caſes, though the Parties be eſtopped to ſay the Truth, the Jury are 2 Co. 4.

not; as in *Goddard*'s Caſe, where the Bond was dated nine Months after the Execution, and after the Death of the Obligor.

Paſc. 4 An. B R. Salk. MS. In Treſpaſs for throwing down and carrying away Stalls, as to all the Treſpaſs but the throwing them down, the Defendant pleaded Not Guilty; and as to the throwing them down, a ſpecial Juſtification, and therein juſtified both the throwing down and carrying away; and on the Iſſue joined, the Judge at the Aſſizes would not try whether the Defendants were Guilty or not of carrying away the Stalls, becauſe they had confeſſed it by their Juſtification; and on Motion for a new Trial it was denied, becauſe the Jury could never find the Defendants Not Guilty contrary to their own Confeſſion upon the Record, though in another Iſſue.

2 R. A. 682. The eighth general Rule is, That whenſoever a Man cannot have Advantage of the ſpecial Matter by pleading, he may give it in Evidence on the general Iſſue. For Example,

Co. Lit. 283. *A.* cannot juſtify the killing another, therefore he may give the ſpecial Matter in Evidence on the general Iſſue, as that it was

1 Jones 240. *Se Defendendo, &c.* So in Trover for Goods, the Defendant may give in Evidence, that he took them for Toll, on the general Iſſue of Not Guilty, becauſe he could not plead it; but it would be otherwiſe in Treſpaſs for taking the Goods, becauſe there he might have pleaded it.

Co. Lit. 282. Hob. 53. The ninth general Rule is, That if the Subſtance of the Iſſue is proved, that is ſufficient. In an Action of Waſte for cutting twenty

twenty Aſhes, Proof that he cut ten is ſufficient, for in Effect the Iſſue is Waſte or no Waſte. So in Debt upon a Bond conditioned to perform Covenants, and Breach aſſigned in cutting down twenty Trees. So in Account, Hob 15.
if the Defendant pleads an Account before *A.* 2 Roll. 706.
and *B.* and iſſue thereon, Proof of an Account before *A.* is ſufficient. But if the iſſue was whether *A.* and *B.* were Church-wardens, Proof that one was and not the other, would not be ſufficient.

If the Iſſue be, whether Lord *Delaware* demiſed, Proof that [illegible] not then, but now is, Lord *Delaware*, is not ſufficient, for whether he was in the Time of the Demiſe Lord *Delaware*, is Part of the Iſſue. In 2 Roll. 706.
Replevin, if the Defendant avows Damage feaſant, the Plaintiff juſtifies for Common, and avers, that the Cattle were levant and couchant, and Iſſue thereon, Proof only for Part of the Cattle is not ſufficient.

In Error to reverſe a Fine, for that the March 25.
Plaintiff was beyond Sea, *&c.* if the Defendant pleads that the Plaintiff returned into the Realm in *Auguſt*, and Iſſue thereupon, if it be proved, that he returned at any Time within five Years, it is ſufficient. In Debt againſt an Executor, the Defendant pleads, that the Teſtator was taken in Execution by Hob. 53, 4.
a *Ca. ſa.* if it is proved that he was taken by an *Alias Ca. ſa.* it is enough, but Proof that he had been taken by a *Capias pro Fine*, or by a *Capias Utlagatum*, would not have maintained the Plea. If Outlawry, at the Suit of *B.* is pleaded, and the Record

prove Outlawry at the Suit of *C.* it is ſufficient.

Jenk's Caſe, Cro. Car. 151. Debt upon Bond againſt the Defendant, as Brother and Heir to *J. S.* upon Iſſue *Riens per Deſcent*, a ſpecial Verdict that the Obligor

Dy. 368. was ſeiſed in Fee, had Iſſue, and died ſeiſed, and that the Iſſue died without Iſſue, whereupon the Lands deſcended to the Defendant, as Heir to the Son of his Brother, and held the Iſſue found againſt the Plaintiff; for the Defendant hath nothing as immediate Heir to his Brother, and if he would charge him as collateral Heir, he ought to have made a ſpecial Declaration.

Holland v. Rowdon. Carth. 126. But if *A.* ſettles an Eſtate upon himſelf for Life, Remainder to his firſt and other Sons in Tail, Remainder to his own Right Heirs, and enters into a Bond, and dies, leaving a Son, who dies without Iſſue, whereupon the Uncle enters, he may be charged as Brother and Heir of *A.* for he muſt make himſelf Heir to him who was laſt actually ſeiſed.

It is neceſſary towards the better comprehending this Rule, to ſee where *Modo et Forma* is of the Subſtance of the Iſſue; for where it is, it muſt be proved.

Co. Lit. 281. Where the Iſſue is joined on the Point of the Action, there *Modo et Forma* is mere Form, and need not be proved; as where a Demandant in *Caſu proviſo*, counts of an Alienation in Fee, and the Tenant ſays, *non alienavit Modo et Forma*, and the Jury find (or Evidence is given) of an Alienation in Tail, it is ſufficient, for the Point and Giſt of the

Writ

Writ is, whether Tenant in Dower aliened to the Diſherison of the Demandant. So in Replevin, where the Defendant avowed the taking as a Commoner Damage feaſant, the Plaintiff in Bar ſaid *J. S.* was ſeiſed of an Houſe and Land, whereto he had Common, and demiſed unto him the thirtieth of *March*, to hold from the Feaſt of the Annunciation next before for a Year, the Defendant traverſed the Leaſe *Modo & Forma*; the Jury found that *J. S.* made a Leaſe to the Plaintiff on the twenty-fifth of *March*, for one Year; and though this is not the ſame Leaſe as pleaded, for this begins on the Day, and the other from the Day, yet the Plaintiff had Judgment, for the Subſtance of the Iſſue, is whether the Plaintiff have ſuch a Leaſe as by Force thereof he might Common. Yet it muſt not depart altogether from the Form of the Iſſue, as if it had been found that he had a Right of Common by Leaſe from another. Pope *v.* Skinner, Hob. 72.

L. brought an Action upon a Promiſſory Note of thirty Pounds, to which the Defendant pleaded, that the Plaintiff was indebted to him in a larger Sum of Money, *ſcilicet*, ſixty Pounds, which far exceeded the Damage laid in the Declaration; Plaintiff replied, that he was not indebted to the Defendant in the Sum of ſixty Pounds *Modo et Forma*, and on Demurrer (for the Plaintiff might, for any Thing appearing to the Contrary in his Replication, owe the Defendant fifty-nine Pounds, nineteen Shillings, and eleven Pence Halfpenny, and therefore tendered an immaterial Langdon *v.* Knight.

terial Iſſue) Court held that the Subſtance of the Replication was, that the Plaintiff was not indebted to the Defendant, in ſo much as would exceed his own Demand in the Declaration, and that was the Queſtion for the Court and Jury, whether he was ſo indebted to the Defendant as to exceed his Demand, and not preciſely how much: And a Caſe was cited by Mr. *Filmer*, which was allowed to be Law, where in Debt upon Bond, Condition to pay a thouſand Pounds, Defendant pleaded, that at the Time of the Bill the Plaintiff owed the Defendant one thouſand five hundred Pounds, to which Plaintiff replied, that he was not indebted to him in one thouſand five hundred Pounds *Modo et Forma* as alledged, and Iſſue thereon, and Verdict for Plaintiff, and upon Motion in Arreſt of Judgment, one Queſtion was, whether Iſſue was well joined, and held it was.

Joy *v.* Roberts, Tr. 5 & 6 G. 2. in Scac.

White *and* Bodinam, 1 Salk. 269.

Covenant by Leſſee againſt Leſſor, Breach aſſigned on the Covenant for quiet Enjoyment, for that the Leſſor ouſted him—Plea, that he entered to diſtrain for Rent, and traverſes, that he ouſted him *de Præmiſſis*, and the Plaintiff demurred, for that he did not traverſe, that he ouſted him *de Præmiſſis*, or of any Part thereof. *Sed per Curiam* Plea good, and Proof of any Part, had the Plaintiff joined Iſſue, would have been ſufficient.

Co. Lit. 281.

But when a collateral Point in Pleading is traverſed, then *Modo et Forma* is of the Subſtance of the Iſſue, and muſt be proved; as if a Feoffment is alledged by two, and this is traverſed *Modo et Forma*; and it is found the Feoff-

Feoffment of one, there *Modo et Forma* is material: So if a Feoffment is pleaded by Deed, and it is traverſed *abſque hoc quod Feoffavit Modo et Forma*, the Jury cannot find a Feoffment without deed. But though the Iſſue be upon a collateral Point, yet, if by finding Part of it, it ſhall appear to the Court that no ſuch Action lies for the Plaintiff, no more than if the whole had been found, there *Modo et Forma* are but Words of Form; as in Treſpaſs, *Quare Vi et Armis*, Defendant pleads, that the Plaintiff holds of him by Fealty and Rent, and for Rent behind he came to diſtrain, and the Plaintiff denies that he holds of him *Modo et Forma*, and the Jury find (or Evidence prove) that he holds of him by Fealty only, the Writ ſhall abate, for by the Statute of *Marlb. c.* 3. no Tenant can maintain Treſpaſs againſt his Lord, ſo the Matter of the Iſſue is whether he holdeth of him or not; but it would have been otherwiſe in Replevin, for there the Avowant being to have a Return muſt make a good Title *in omnibus*.

Co. Lit. 281.

Ibid. L. 281, 2.

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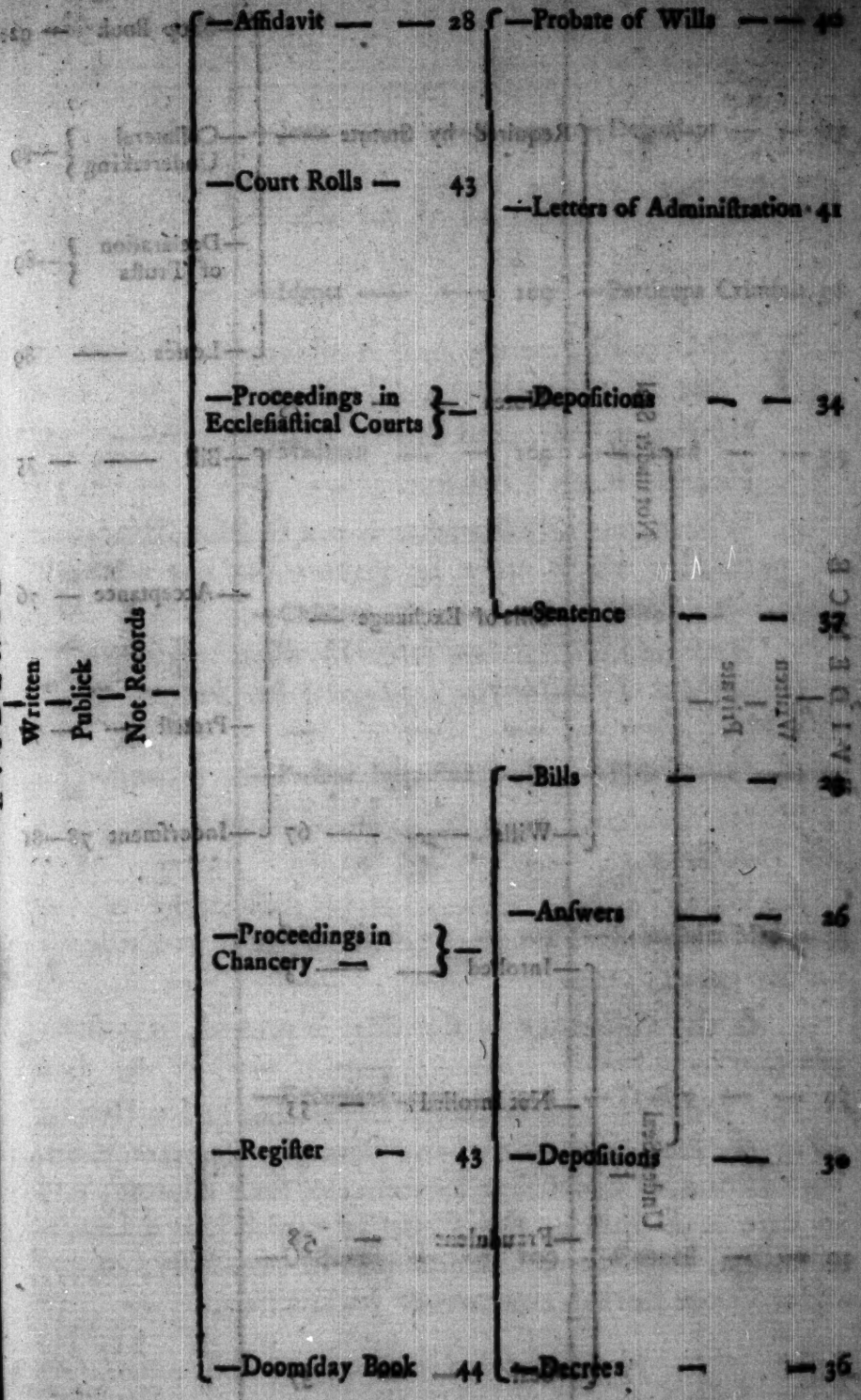
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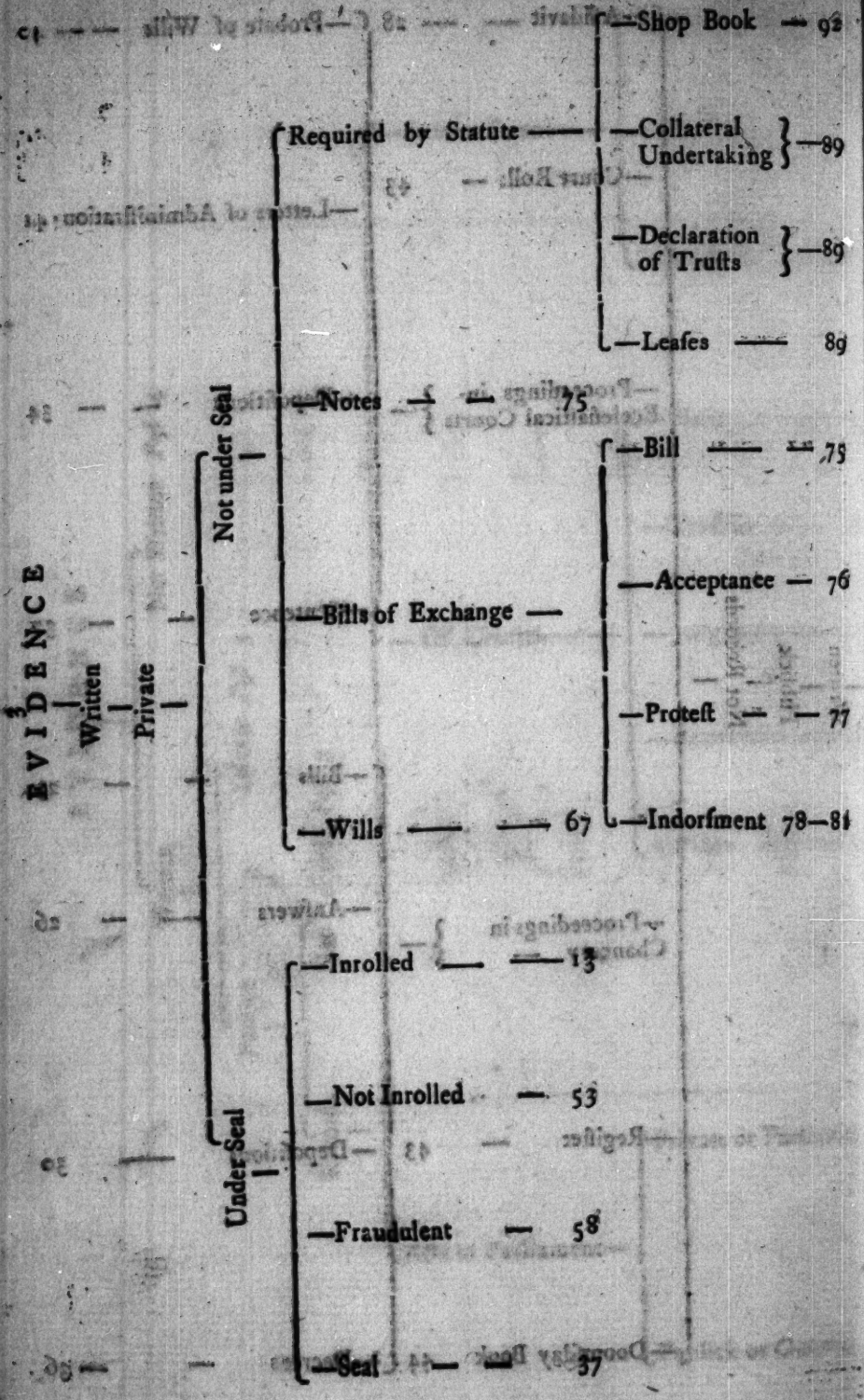
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